Supreme Court, U.S.
FILED

95 1365 FEB 26 1996

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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

ARCHEXPO COMMERCE & INDUSTRY CENTRE, BORIS KHLEBIN and ANDREI SCHERBAKOV,
Petitioners,

v.

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a Federal Circuit Court violate the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Federal Arbitration Act, when it reinstates a judgment the lower court vacated because it was obtained for the purpose of circumventing the arbitration clauses of an international agreement and because it had the impact of nullifying an arbitral award that had been judicially confirmed in a final judgment no longer subject to direct appeal?

2. Do Federal Circuit Courts have the freedom to ignore the procedural law of a contractually selected foreign arbitral forum, when to do so allows the Court to refuse to accord preclusive effect to an arbitral award that has been confirmed in a Federal District Court under the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and when that judgment of confirmation was not appealed?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were: Archexpo Commerce & Industry Centre, a commercial entity organized under the laws of the Russian Republic of the former Soviet Union; its then director, Boris Khlebin; its then deputy director, Andrei Scherbakov; and International Ambassador Programs, Inc., a corporation organized under the laws of the State of Washington. Archexpo Commerce & Industry Centre has no parent or subsidiary company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Archexpo Commerce & Industry Centre (Archexpo), Boris Khlebin, and Andrei Scherbakov (hereinafter collectively "Archexpo") respectfully pray that this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in Nos. 94-35588 & 94-35589 (consolidated), which was entered on October 13, 1995.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 68 F.3d 337 (9th Cir. 1995), bears Nos. 94-35588 & 94-35589 (consolidated), and is reprinted in the Appendix (App.) to this petition at pages App. 3-28.

The Ninth Circuit's order denying Archexpo Commerce & Industry Centre's petition for rehearing is unreported and is reprinted at App. 1.

A series of orders and judgments of the United States District Court for the Eastern District of Washington underlie the Ninth Circuit's decision. None of these orders and judgments are reported, and each of them is reprinted in the Appendix. First, there are a several rulings that appear in *International Ambassador Programs, Inc. v. Archexpo, et al.*, No. CS-90-0483 (E.D.Wash.): the July 24, 1991 order and judgment in favor of respondent International Ambassador Programs, Inc. (App. 85); the February 3, 1994 order vacating that judgment and denying a stay of a judgment in the parallel proceeding noted below (App. 39); and the order denying a motion to reconsider the vacation and refusal to stay (App. 29). Second, there is the order and judgment in *Archexpo Commerce & Industry Centre v. International Ambassador Programs, Inc.*, No. CS-93-087 (E.D. Wash.) (App. 69), which confirmed a Russian arbitral award in Archexpo's favor, and served as the basis of the vacation of the judgment in No. CS-90-0483. In addition, although the District Court did not consolidate the cases, the order in No. CS-90-0483 granting vacation and refusing a stay, was entered in identical form in No. CS-93-087.

Respondent International Ambassador Programs, Inc., perfected appeals to the Ninth Circuit from both sets of rulings. The Ninth Circuit consolidated these appeals and decided them in the opinion for which Archexpo seeks review.

The opinion of The Arbitration Tribunal of the USSR Chamber of Commerce, Case No. 69/1990, entered on March 10, 1992, is reprinted at App. 89.

JURISDICTION

The Court of Appeals for the Ninth Circuit entered its decision reversing the District Court's judgment on October 13, 1995. App. 3.

The Court of Appeals for the Ninth Circuit entered its order denying Archexpo's petition for rehearing on November 30, 1995. App. 1.

This Court possesses jurisdiction under 28 U.S.C. § 1254(1) to review the Court of Appeal's decision.

TREATIES, STATUTES AND INTERNATIONAL CONVENTIONS INVOLVED

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, opened for signature on June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38, reprinted in 9 U.S.C. § 201 note (Supp. 1994):

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. Convention, Art. II, § 1.
>
> * * * *
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed. Convention, Art. II, § 3.
>
> * * * *
>
> Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down

> in the following articles. There shall not be imposed substantially more onerous conditions . . . on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards. Convention, Art. III.

The United States Arbitration Act, 9 U.S.C. § 201:

> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards . . . shall be enforced in United States courts in accordance with this Chapter.

Russian Arbitration Rules, Art. 62, VII-5 *Collected Legislation of the Union of Soviet Socialist Republics and the Constituent Union Republics,* at 26 (Oceana Publications 1988):

> A state arbitrator shall refuse to accept a petition to sue if:
>
> * * * *
>
> (3) in a court, state arbitrazh, [or] mediation tribunal . . . there is a case proceeding regarding a dispute between the same parties, on the same subject, and on the same grounds.

Federal Rule of Civil Procedure 44.1:

> A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination shall be treated as a ruling on a question of law.

STATEMENT OF THE CASE

This case concerns the responsibility of the federal courts to recognize and enforce fully a foreign arbitral award that has been confirmed in the United States under the Federal Arbitration Act and the Convention on the

Recognition and Enforcement of Foreign Arbitral Awards. *See* 9 U.S.C. § 201. The award in this case was issued by The Arbitration Tribunal of the USSR Chamber of Commerce. It resolved a commercial dispute between International Ambassador Programs, Inc. (IAP), an American company in the business of organizing foreign tours, and Archexpo, the Russian entity with which IAP contracted for assistance in the former Soviet Union.

The United States District Court for the Eastern District of Washington confirmed the award in favor of Archexpo, and IAP did not appeal. The award thus remains in effect, but principally as a matter of form rather than substance. The Ninth Circuit has undermined the arbitral award by reinstating the judgment entered in a competing action. That judgment completely off-sets the arbitral award, and imposes substantial additional liability on Archexpo. In the words of the District Court whose order of vacation the Ninth Circuit has reversed, IAP prosecuted that action against Archexpo as a "hedge against the possibility of an adverse arbitration award," and "in an effort to circumvent the arbitration clauses contained in its various agreements with Archexpo." App. 56 & 64. The Ninth Circuit's decision countenances and indeed encourages this circumvention of international arbitration awards.

IAP is a Washington corporation that organizes tours of foreign countries for delegations of United States citizens. IAP conducted its tours under at least two trade names: State Leadership Initiative and Citizen Ambassador Program. According to IAP, these trade names were utilized for commercial purposes by a single IAP "division responsible for administering delegation programs throughout the world." [1] Archexpo is a Russian commercial entity that provided assistance to tour operators such as IAP.

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[1] This statement is contained in a federal court declaration of the IAP official who served as its President during the period of

In early 1989, as the former Soviet Union was becoming increasingly open to exchanges with the West, IAP and Archexpo formed a business relationship that facilitated the participation of American citizens in that process. Archexpo and IAP entered into a series of contracts and protocols, all of which concerned the organization and servicing of tours to the Soviet Union. The first of these documents is dated April 28, 1989, and contains a provision for resolving all disputes between the parties through arbitration in the Soviet Union:

> The parties shall use their best effort to settle all possible disputes and differences arising out [of] or in relation to this Agreement amicably. If agreement is not reached all disputes and differences without recourse to courts of law shall be referred to the arbitration tribunal with the USSR Trade and Industry Chamber for resolution, such resolution acknowledged as final by the parties. ER 104.

During their course of dealing, IAP and Archexpo executed at least four additional documents concerning the provision of tour support services. Those documents were dated May 15, 1989, August 10, 1989, August 22, 1989, and September 30, 1989.[2] Of these, the May 15, 1989 and August 22, 1989 documents restate in substantially identical form the arbitration provision that appears in the parties' original agreement. All of these documents identify IAP by its "Citizen Ambassador Program" trade name.

The record also contains an additional document, of disputed provenance, that only Archexpo executed and

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the parties' commercial relationship. The declaration appears in the Ninth Circuit's record at page 31 of the Excerpts of Record (ER). Archexpo will cite to those ERs when referring to portions of the record that it has not reproduced in the Appendix to this Petition.

[2] They are found in the Ninth Circuit's record at, respectively, ER 105, ER 106, ER 107 and ER 110.

which identifies IAP as "IAP, Inc. 'State Leadership Initiative.'" ER 13. It purports to apply to the period July-December 1989. *Id.* This document, which served as the basis of the Judgment IAP ultimately obtained against Archexpo, does not contain an arbitration provision.

The parties' course of dealing lead to a commercial dispute. On March 19, 1990, Archexpo filed a complaint in Moscow with the Arbitration Tribunal of the USSR Chamber of Commerce (the Arbitration Tribunal) against IAP arising out of the disagreement. App. 89. IAP responded to this complaint, and on November 19, 1990 filed what the Arbitration Tribunal characterized as a "lengthy" pre-hearing brief. App. 94 & ER 121. IAP contended both that the Arbitration Tribunal lacked jurisdiction over the claims, and that the claims were otherwise meritless. ER 121-177. Regarding the former, IAP argued that certain of the documents providing for arbitration, including the April 1989 document, were invalid. As to the latter, IAP argued that Archexpo had failed to provide the required services for IAP's delegations. In pursuing its contention that Archexpo failed to deliver the desired services, IAP did not distinguish between delegations created under its two trade names. Rather, IAP's arbitration briefing referred generically to IAP's "delegations," and its evidence embraced both State Leadership Initiative and Citizen Ambassador Program groups.[3] As discussed below, IAP

[3] The record provides ample support for this proposition. *See, e.g.*, ER 14-15 (IAP's identification of certain State Leadership Initiative groups, including "Meyer" and "Knox"); *id.* at 48-49 (IAP's then President's declaration to the Arbitration Tribunal referring to alleged Archexpo defaults concerning various delegations); *id.* at 50 (IAP arbitration damage exhibit showing intermingling of group accounts); *id.* at 128 (IAP's pre-hearing arbitration brief referring collectively to Archexpo's alleged defaults concerning groups); & App. 152-158 (Arbitration Tribunal decision recounting IAP's evidence concerning State Leadership Initiative groups, such as "Meyer" and "Knox," as well as Citizen

did, however, purposefully withhold certain theories of recovery and damages from the Arbitration Tribunal.

While IAP availed itself of the Arbitration Tribunal's procedures, it was disgruntled and apprehensive about its chances. IAP stated to the Arbitration Tribunal that despite the Moscow proceedings it would be filing a lawsuit in the United States to ensure that

> Archexpo will not collect anything as a result of this arbitration even if the full amount of the claim is awarded to Archexpo and even if the arbitration award would be enforceable in the United States (which, as shown below, it will not). ER 128.

In fact, IAP had at the time of this pleading already filed that action. ER 1 & 195. IAP served it on Archexpo in Moscow soon thereafter. ER 6. Despite this development, the Arbitration Tribunal conducted its hearing in Moscow and IAP participated on the merits with the assistance of counsel. On November 21, 1990, after a two-day hearing, the Arbitration Tribunal took the matter under advisement. App. 118 & 43.

During the pendency of the arbitration proceedings, IAP pursued its federal action, *International Ambassador Programs, Inc. v. Archexpo, et al.*, No. CS-90-0483 (E.D. Wash.). This action concerned a State Leadership Initiative delegation, named the "Peterson" delegation, from Minnesota. IAP had referred in the Moscow arbitration to the losses it allegedly suffered due to the cancellation of this delegation, but chose not to put its evidence on this issue before the Arbitration Tribunal. ER 128.

IAP's federal suit was premised alternatively on Archexpo's alleged breach of a joint venture "contract" (allegedly embodied in the document referred to above that did not contain an arbitration provision, *see* ER 13), or

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Ambassador groups). The Arbitration Tribunal's indiscriminate reference in its final decision to the various types of delegations is thus consistent with IAP's presentation.

on breach of an implied contract arising from the parties' dealings. ER 2-3. IAP invoked the District Court's jurisdiction under 28 U.S.C. § 1332(a)(2). *Id.*

On May 9, 1991, before the Arbitration Tribunal had rendered its decision and before Archexpo had answered the federal complaint, IAP filed a motion for summary judgment in its federal action. Archexpo responded with a letter to IAP dated June 3, 1991, in which it stated that the federal action

> relates to the dispute between the Archexpo [C]enter and IAP. According to the agreements of April 28, 1989 (art. 17) and August 22, 1989 (art. 3.10) . . . the conflict falls under the jurisdiction of the Arbitration court at the USSR Chamber of Commerce and Industry. ER 46.

Archexpo sent a copy of this response to IAP's motion for summary judgment to the Honorable Robert McNicols, who was presiding over the case in the Eastern District of Washington. Archexpo did nothing further to defend the motion. The Judge acknowledged that he had received this letter. The record recites that he viewed it, however, as "indicat[ing] nothing." ER 180-181. He granted IAP summary judgment on July 24, 1991, and awarded IAP $493,454.23 in damages, $400,000.00 of which was based on an alleged injury to IAP's business reputation. App. 87 & ER 43. Archexpo did not appeal.

Thereafter, on March 10, 1992, the Arbitration Tribunal awarded Archexpo $128,930.00 in damages and $2,800 in arbitration fees. App. 182. In reaching this decision, the Arbitration Tribunal addressed IAP's alleged losses on the merits. Indeed, the Arbitration Tribunal expressly treated IAP's assertions as a counterclaim, App. 180, which was consistent with the compulsory counterclaim rule that governs in Russian arbitration procedure. *See* Art. 62 of Russia's Arbitration Rules, *supra* at 4. The Arbitration Tribunal denied IAP's counterclaim. App. 180-81.

IAP did not pay the arbitration award. As a result, on March 9, 1993, Archexpo filed a petition in the Eastern District of Washington for confirmation of its arbitration award. *See Archexpo Commerce & Industry Centre v. International Ambassador Program*, No. CS-93-087 (E.D. Wash.); ER 201. The Court had jurisdiction of this case under 9 U.S.C. § 203. On August 11, 1993, the Court confirmed Archexpo's arbitration award, and on September 8, 1993, the Court entered an amended judgment for $154,159.00. App. 69 & 83-84.

In confirming Archexpo's award, the Court expressly recognized that the Convention on the Recognition and Enforcement of Foreign Arbitral Awards governed. App. 71-72 (citing the Convention and 9 U.S.C. § 201). The Court rejected IAP's contentions, parallel to those it had made in the Moscow arbitration, that the Arbitration Tribunal lacked jurisdiction because the April 1989 document was allegedly invalid. More importantly, however, the Court also found IAP's contention concerning the April 1989 document irrelevant.

The Court reasoned first that IAP had submitted the question of the arbitrators' jurisdiction to the arbitrators, who rejected IAP's assertions that the Tribunal lacked jurisdiction and that certain aspects of the parties' dealings were discrete and non-arbitrable. The arbitrators found the parties' relationship to be a unitary course of conduct, and entered an award based "upon the extended commercial relationship between the parties." App. 74. *Cf.* App. 136 (Arbitration Tribunal stating that the business between the parties "was in the nature of extended commercial relationship"). In confirming the award, the Court found the arbitrators' predicate finding significant. This is because it followed from the determination that the relationship between the parties constituted a single course of conduct, that any one, valid, comprehensive arbitration provision was sufficient to support the arbitrators' jurisdiction. The August 22, 1989 document, of uncontested

validity, provided for the arbitration of all disputes,[4] and therefore created a solid basis for the District Court to confirm the arbitrators' exercise of jurisdiction. App. 74. IAP's contentions concerning the April agreement were therefore irrelevant. *Id.* Thus, when it confirmed the award, the Court necessarily confirmed as well that the course of conduct between the parties was a unitary one properly addressed in a unitary arbitration proceeding. *Id. IAP did not appeal from this judgment.*

On October 20, 1993, IAP, citing its prior judgment, moved the Court (in No. CS-93-087) to stay the confirmation of Archexpo's arbitration award. ER 203. On December 16, 1993, Archexpo moved the Court (in No. CS-90-483) to vacate IAP's judgment. ER 195. The Court heard oral argument on both motions and on February 4, 1994, entered identical orders in each case denying the stay and granting Archexpo's motion to vacate. App. 39-68.

The District Court's orders were technically based on the conflict between the two competing decisions and the established rule of preclusion giving precedence to the judgment last in time on a unitary cause of action. The Court first explained that the actions arose from a single commercial arrangement. The District Court recited at length the facts demonstrating that the IAP judgment and the claims pursued in the Moscow arbitration addressed components of a single extended transaction, and thus should have been handled in a single case. The Court noted that the underlying documents were all executed

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[4] The August 22, 1989 undertaking provides in relevant part:

> 3.10 Parties shall take all measures to settle disputes and differences arising from or in connection with their Agreement by means of negotiations. In case decision is not reached all disputes and differences without recourse to courts of law shall be passed to the Arbitration [T]ribunal with the USSR Chamber of Commerce and Industry for settlement, which parties agree to accept as final. ER 108.

during the same time period, were motivated by the same considerations, and concerned the same type of tours and services. The District Court also found as a fact that the parties intended to create one, "continuing commercial relationship," as opposed to a series of separate contracts. App. 52. Of course, as discussed above, this ultimate finding is also necessarily a part of the findings of the Arbitration Tribunal and of the District Court judgment confirming the award.

Then, having determined that the arbitration and the Court's confirmation thereof on the one hand, and IAP's prior judgment on the other, concerned the same cause of action because they arose from the same course of conduct and series of interrelated transactions, the Court gave preclusive effect to the last judgment—the judgment confirming the arbitration. *See, e.g., Americana Fabrics, Inc. v. L & L Textiles, Inc.*, 754 F.2d 1524, 1529-1530 (9th Cir. 1985).

Despite the prosaic character of this reasoning, it is clear from the District Court's emphatic tone and pointed observations that much more was at issue than the application of established principles of *res judicata*. The Court understood that to recognize the controlling stature of the second judgment was also, and most importantly, to be faithful to the letter and spirit of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Congressional implementation of that Convention in the Federal Arbitration Act. Indeed, the need to accord jurisdictional primacy to the arbitral forum constitutes the pervading subtext of the District Court's decision. It observed that when IAP first sought relief in federal court, it "was well aware of the arbitration proceeding and the risk of a ruling contrary to its interests. (Indeed, it appears that IAP filed its complaint as a hedge against the possibility of an adverse arbitration award.)" App. 56. The Court then stressed the " 'strong presumption in favor of enforcement of freely negotiated contractual choice-of-

forum provisions,'" and emphasized that this "federal policy favoring arbitral dispute resolution 'applies with special force in the field of international commerce.'" App. 63-64 (quoting in each instance *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985)).

Having grounded its ruling in these additional considerations, the Court held against IAP, finding that

> *IAP sued Archexpo in this district in an effort to circumvent the arbitration clauses contained in its various agreements with Archexpo.* The judgment IAP ultimately obtained not only infringes upon the authority of the Arbitration Tribunal of the USSR Chamber of Commerce and Industry, it also contravenes the policies set forth above [strongly favoring the enforcement of foreign arbitral awards]. App. 64 (emphasis added).

IAP moved the Court for reconsideration in both actions, and the Court denied that motion on May 10, 1994. App. 29-38. On the "last in time" question, the District Court reiterated its reasoning that the confirmation decision constituted the "second," preclusive judgment: IAP's judgment was entered first, and on the prior Court's incorrect assumption that there was subject matter jurisdiction. However, IAP had submitted the question of jurisdiction on the merits to the arbitrators. The arbitrators thereafter decided that they possessed jurisdiction over all of the commercial disputes between the parties. When the District Court confirmed this determination, its ruling, coupled with the arbitration decision, stood as the "second," preclusive judgment. App. 32-36.

IAP filed appeals from the orders denying the stay of the confirmed award and vacating IAP's judgment. ER 74-75.

The Ninth Circuit took a very different view in a decision that is worthy of review not for what it states about principles of preclusion, but for what it achieves through

their misuse. In an opinion redolent with antipathy toward arbitration, the Ninth Circuit reversed the District Court and countenanced IAP's circumvention of the arbitral forum. It based its ruling on two determinations, neither of which is sustainable.

First, it held that the proceedings in Moscow could not inhibit the power of the federal court to entertain IAP's damages action during the course and prior to the conclusion of the Moscow arbitration. It grounded this ruling on its premise that the April 1989 document was the only one relevant to the Moscow arbitration, and on its finding that the parties' course of conduct involved a series of discrete transactions, each of which had independent stature under separate contracts. In the Ninth Circuit's view, the April 1989 agreement concerned only certain "Citizen Ambassador" delegations. Because the cancelled "Peterson" group tour was allegedly based on a separate contract, and involved "State Leadership Initiative" tourists rather than "Citizen Ambassador" tourists, disputes about that delegation did not fall under the April agreement's arbitration clause, and therefore was not subject to arbitration in Moscow. Thus, the Court ruled, IAP was free to litigate its damage action. App. 18-21.

Among other things, this approach stands in stark contrast to the District Court's unappealed determinations in the confirmation action that the arbitration award was based not on individual contracts but on the "extended commercial relationship between the parties," and that the August 1989 contract was fully applicable to the arbitration. App. 74. It must be emphasized that these determinations were *not* subject to direct review at the Ninth Circuit. Indeed, the *only* order the Ninth Circuit reversed was in *IAP*'s action.

Second, having set forth its predicate that IAP was otherwise free to litigate its "Peterson" Group claim, the Ninth Circuit then considered whether under principles of *res judicata* the unappealed judgment confirming

Archexpo's award should nevertheless be accorded preclusive weight and thus foreclose IAP's damages judgment. IAP argued that the test set forth under Section 22 of the *Restatement (Second) of Judgments* (1982) should control this issue, and the Ninth Circuit agreed.

Under Section 22, the confirmation action would be preclusive only if IAP's failure to present its damages claim in the arbitration violated a compulsory counterclaim rule of the arbitral forum, or if successful subsequent prosecution of the counterclaim would "nullify the initial judgment or would impair rights established in the initial action." *Id.*, § 22(2). IAP urged that none of these conditions were satisfied.

Archexpo responded to IAP's contention with, *inter alia*, a submission demonstrating that Russian law did indeed contain a compulsory counterclaim rule (Article 62 of Russia's Arbitration Rules) that applied to the arbitration. *See* Archexpo's Supplemental Authority dated February 27, 1995 and filed March 3, 1995.

The Ninth Circuit simply ignored this showing and ruled in favor of IAP. It stated twice that no such rule existed: "Nor was Ambassador required to raise the counterclaim by a compulsory counterclaim rule." App. 25. "As noted above, there was no rule requiring Ambassador to present the claim as a compulsory counterclaim, and, in fact, it did not do so." App. 26.

This move allowed the Court to reverse the District Court. The Ninth Circuit then entered its order remanding the case with instructions that IAP's judgment should be reinstated, and that Archexpo's arbitral award could be employed to set that judgment off in part. App. 27.

Archexpo sought reconsideration, and in support presented once again the text of the applicable Russian compulsory counterclaim rule. *See* Petition For Rehearing (October 26, 1995). The Ninth Circuit nevertheless denied Archexpo's motion for reconsideration without comment. App. 1-2.

REASONS FOR GRANTING THE WRIT

This Court should review the decision of the United States Court of Appeals for the Ninth Circuit because that decision sanctions the use of the United States Courts for the illicit purpose of undermining validly secured international arbitral awards. The Ninth Circuit has thus significantly departed from the appropriate course of judicial proceedings. This Court should correct that serious misstep through exercise of its supervisory authority under Supreme Court Rule 10(a).

I. THE NINTH CIRCUIT HAS IMPERMISSIBLY FAILED TO ADHERE TO THE FEDERAL LAW REQUIRING THE COURTS TO RECOGNIZE AND ENFORCE FULLY FOREIGN ARBITRAL AWARDS

Since 1970 the federal courts have been under a federally mandated obligation to uphold fully a validly secured foreign arbitration award. In that year, the United States acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention), and Congress passed Chapter 2 of the United States Arbitration Act implementing the Convention. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

The Convention requires that each contracting state recognize the force of international arbitration agreements. Convention, Art. II., § 1. As a part of that recognition, the Convention requires a contracting state's courts to abstain from exercising jurisdiction over the merits of a matter subject to arbitration:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that said agreement is null and void, inoperative or incapable of being performed. Convention, Art. II, § 3.

The Federal Arbitration Act requires that the Convention be enforced in United States Courts through the use of the Arbitration Act's procedures, which include the confirmation process Archexpo employed. 9 U.S.C. §§ 201 & 207.

This Court has often recognized the "emphatic federal policy in favor of arbitral dispute resolution." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. at 631. It has gone on to emphasize in light of the Convention and Congress' implementing legislation that this strong "federal policy applies with special force in the field of international commerce." *Id.* Indeed, the Court has been unequivocal concerning the detrimental implications of a "parochial refusal" to enforce international arbitral remedies: "[It would] damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Id.*, quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. at 516 & 517.

If this mandate is to have meaning, it must include protecting valid, duly confirmed foreign arbitral awards from judicial proceedings that achieve indirectly what our law prohibits a litigant from accomplishing directly. Successful efforts to undermine a foreign arbitral award collaterally transgress the Convention just as much as do refusals to confirm in the first instance. "A court should not close its eyes to what is plainly there." *McCreary Tire & Rubber Co. v. CEAT S.p.A.*, 501 F.2d 1032, 1038 (3rd Cir. 1974) (precluding a litigant from attempting to undermine an arbitral proceeding under the Convention through the attachment of assets in this Country).

In this case, the Ninth Circuit has countenanced just such an illicit undertaking.

When the United States District Court confirmed Archexpo's award, the Court determined both that the

dispute between the parties was subject to arbitration and that the arbitral award resolving the dispute was based upon, and thus embraced, the "extended commercial relationship between the parties." App. 74. Under the Convention, these determinations meant that any court "seized" of an action embraced within that "extended commercial relationship," as was the District Court hearing IAP's damages suit, was prohibited from proceeding to judgment. *See, e.g., McCreary Tire & Rubber Co.*, 501 F.2d at 1037.

These District Court determinations were certainly contrary to those implicit in IAP's prior judgment; the Court in that instance ruled as if it were not subject to any such constraint. IAP may therefore have had objections to these determinations, or to the fashion in which the District Court arrived at them. However, IAP did not appeal. The District Court's judgment thereupon became final, and the determinations upon which it rested became conclusive. *See, e.g., Laborers' Intern. Union of North America, AFL-CIO v. Foster Wheeler Energy Corp.*, 26 F.3d 375, 396-397 (3d Cir.), *cert. denied*, 115 S.Ct. 356 (1994).

The finality of these determinations, coupled with the "last-in-time" rule of preclusion, caused the vacating court properly to accord preclusive weight to the confirmation judgment. *See, e.g., Robi v. Five Platters, Inc.*, 838 F.2d 318, 322-23 (9th Cir. 1988). It did so, moreover, after expressly finding as a fact that IAP's damages action was prosecuted for the illicit purpose of circumventing the arbitration provisions to which the parties subscribed and the arbitral proceedings that they pursued in Moscow. The District Court thus grounded its decision solidly on both accepted principles of preclusion and the primacy under the Federal Arbitration Act and the Convention of Archexpo's arbitral award.

The Ninth Circuit did not treat the determinations of the confirming court as final. Nor did it recognize the

extent to which the vacating court's judgment was necessarily tied to those conclusive findings and the mandate of federal and international law. Further, the Ninth Circuit ignored the District Court's express finding that IAP had invoked the jurisdiction of the federal courts for the improper purpose of circumventing the federally protected arbitral remedy. *Cf.* Fed. R. Civ. P. 52(a).

Rather, the Ninth Circuit arrogated to itself the power to decide anew previously determined dispositive questions implicating the integrity of a confirmed arbitration award. It then rendered a decision that nullified Archexpo's award. It did not vacate the award's confirmation, but rather allowed IAP's federal damages judgment of approximately three-times the award's value to be "set-off" against it. Certainly, this process allows one to assert that the Ninth Circuit has not directly eliminated the arbitral award. But this is to fail to recognize substance. The Ninth Circuit accomplished indirectly what the Convention and the Federal Arbitration Act prohibit all litigants from accomplishing directly. *Cf. Hewlett-Packard Company v. Berg*, 61 F.3d 101, 105 (1st Cir. 1995) (stating that "[i]t is hard to imagine a step that would be more offensive to the pro-arbitration policies reflected in Congress' endorsement of the 1958 Convention on the Recogniiton and Enforcement of Foreign Arbitral Awards" than allowing a judicial set-off of an arbitral award by a legal claim properly subject to arbitration); *see also McCreary Tire & Rubber Co.*, 501 F.2d at 1038.

This decision constitutes a significant transgression of federal and international law, and should be corrected through the exercise of this Court's supervisory authority.

II. FEDERAL LAW PRECLUDES A FEDERAL COURT FROM IGNORING A PROCEDURAL RULE OF AN ARBITRAL FORUM WHEN TO DO SO RESULTS IN A REFUSAL TO EXTEND PRECLUSIVE IMPACT TO A FOREIGN ARBITRAL AWARD CONFIRMED BY A UNITED STATES COURT UNDER THE CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute." *Scherk v. Alberto-Culver Co.*, 417 U.S. at 519. Consistent with this principle, the Ninth Circuit determined that whether Archexpo's confirmed arbitral award was preclusive of IAP's damages action turned on whether the *Arbitration Tribunal's* proceedings were conducted under a procedure making counterclaims compulsory. However, the Ninth Circuit then flouted this principle; while recognizing the need to refer to the Arbitration Tribunal's procedural rules, it simultaneously refused to consider them on their merits.

Archexpo presented to the Ninth Circuit Article 62 of Russia's Arbitration Rules, which provides in relevant part:

> A state arbitrator shall refuse to accept a petition to sue if:
>
> * * * *
>
> (3) in a court, state arbitrazh, [or] mediation tribunal . . . there is a case proceeding regarding a dispute between the same parties, on the same subject, and on the same grounds. *See supra* at 4.

Archexpo showed that this rule constitutes a compulsory counterclaim rule because it prohibits an arbitral tribunal from considering in a subsequent arbitration any dispute that involves the same subject matter and parties as a dispute that was previously submitted to arbitration.

Archexpo supported this argument with analysis contained in a treatise on Russian arbitration procedure. *See* Petition for Rehearing at 5, *citing and quoting* A. Dobrovolsky, *The Arbitration Process In The USSR*, at 162-163 (Moscow University Publishers, 1983). This submission was fully consonant with federal law, and the Ninth Circuit should have addressed its impact as a matter of law. *See* Fed. R. Civ. P. 44.1; *see also* 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2446 at 658 (1995) ("attorneys should be permitted to present new foreign-law material on appeal"). Instead, the Ninth Circuit simply ignored it, stating twice without explanation that no such rule existed. *See* App. 25-26.

The Ninth Circuit's choice to ignore this legal submission allowed it to refuse to accord preclusive weight to Archexpo's arbitral award. Thus, in turn, it allowed the Court to reinstate the damages judgment IAP obtained for the purpose of circumventing the award confirmed under the federal Arbitration Act and the Convention. This is a serious departure from the proper course of judicial proceedings.

Federal Rule of Civil Procedure 44.1 makes the determination of foreign law a question of law subject to a *de novo* standard of review. This surely implies that both district and appellate courts are bound to address a submission on foreign law on its merits. *See, e.g., Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir. 1993). Indeed, simply to ignore such a submission is "little less than an abdication of the judicial function." *Cf. La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957). When to ignore such a submission is in addition the means for undermining a confirmed arbitration award, the abdication takes on unusually compelling significance. This Court should correct this departure from the proper course of judicial proceedings.

CONCLUSION

For the foregoing reasons, this Court should grant this petition for certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

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IN THE UNITED STATES

COURT OF APPEALS FOR THE

NINTH CIRCUIT

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	**NO. 94-35588**
Plaintiff-Appellant,	**D.C. NO. CV-90-00483-RJM**
v.	
ARCHEXPO, a USSR Company; BORIS KHLEBIN; ANDREI SCHERBAKOV,	
Defendants-Appellees.	

ARCHEXPO COMMERCE AND INDUSTRY CENTRE, INC.,	)	NO. 94-35589
	)	D.C. NO.
	)	CV-93-
Plaintiff-Appellee,	)	00087-FVS
	)	
v.	)	
	)	ORDER
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	)	
	)	November 30,
	)	1995
Defendant-Appellant.	)	
	)	

Before:

BEEZER and HAWKINS, Circuit Judges,

and TEVRIZIAN,* District Judge.

The petition for rehearing is DENIED.

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*Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	**NO. 94-35588**
Plaintiff-Appellant,	**D.C. NO. CV-90-00483-RJM**
v.	
ARCHEXPO, a USSR Company; BORIS KHLEBIN; ANDREI SCHERBAKOV,	
Defendants-Appellees.	

Appeal from the United States District Court for the Eastern District of Washington

Robert J. McNichols,
District Judge, Presiding

ARCHEXPO COMMERCE AND INDUSTRY CENTRE, INC.,	) NO. 94-35589
Plaintiff-Appellee,	) D.C. NO. CV-93-00087-FVS
v.	) OPINION
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	
Defendant-Appellant.	

Appeal from the United States District Court for the Eastern District of Washington

Fred L. Van Sickle,

District Judge, Presiding

Argued and Submitted

August 11, 1995 – Seattle, Washington

Filed October 13, 1995

Before:

Robert R. Beezer

and

Michael Daly Hawkins,

Circuit Judges,

and

Dickran M. Tevrizian,*

District Judge

Opinion by Judge Hawkins

SUMMARY

Civil Litigation and Procedure/

Alternative Dispute Resolution/

Res Judicata

The court of appeals reversed a district court judgment and remanded. The

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*Honorable Dickran M. Tevrizian, United States District Judge for the Central District of California, sitting by designation.

court held that where two agreements were separate and independent, the arbitration clause contained in one agreement did not apply to the other, later agreement.

Appellant International Ambassador Programs, Inc. arranges tours and informational visits in foreign countries. Ambassador organizes tours under two separate divisions: the "Citizen Ambassador Program" (CAP) and the "State Leadership Initiative" (SLI). Appellee Archexpo Commerce and Industry Centre, a Russian limited partnership, facilitates and expedites tours such as those sponsored by Ambassador in Russia.

In April 1989, Archexpo and Ambassador entered into an agreement relating to tours in Russia (the April agreement). The April agreement called for Archexpo to perform services in connection with Ambassador's CAP tours and contained a clause providing that disputes without

recourse to courts of law would be referred to the "arbitration tribunal with the USSR Trade and Industry Chamber" for final resolution.

Archexpo and Ambassador later entered into another agreement (the July agreement) which dealt with Ambassador's SLI program. The July agreement did not contain an arbitration clause.

After CAP tours organized under the April agreement were complete, a dispute arose. Archexpo claimed it was not paid for certain fees due under the April agreement. Ambassador denied it owed additional payments and claimed an offset for refunds it paid. The parties submitted the dispute to arbitration in Moscow, as required by the April agreement. Ambassador told the arbitrators that it believed it had separate legal claims against Archexpo which it intended to pursue in the United States.

Ambassador sued in the district court claiming Archexpo's sudden cancellation of an SLI delegation was a breach of the July agreement (the SLI suit). Archexpo sent a letter to Ambassador's counsel referring to the Moscow arbitration, but did not ask the district court to stay or dismiss the litigation or to compel arbitration of the July agreement. Ambassador was awarded judgment of $493,454 against Archexpo (the SLI judgment).

Archexpo prevailed in the Moscow arbitration. Archexpo filed an action in the district court to confirm the award, and judgment was entered in Archexpo's favor against Ambassador in the amount of $154,159 (the arbitration judgment).

Ambassador moved to offset Archexpo's arbitration judgment against Ambassador's SLI judgment. Raising res judicata issues for the first time,

Archexpo filed a cross-motion to vacate Ambassador's award as a "prior inconsistent judgment" under the "last-in-time" rule. The district court vacated the SLI judgment. Ambassador appealed.

[1] There was substantial evidence that the April and July agreements were independent and that the April agreement's arbitration clause did not control the separate agreements of the parties. The agreements concerned separate types of tours and completely different groups of tourists. The July agreement contained no arbitration clause. In addition, the proof necessary to establish Archexpo's Moscow arbitration claims under the April agreement had nothing to do with the dispute under the July agreement.

[2] Although Ambassador's claims under the July agreement were mentioned in arbitration documents, Ambassador spe-

cifically reserved the claims for the United States litigation. Thus, the July agreement were separate and independent from the April agreement, and the arbitration clause did not apply to the July agreement. The district court erred by vacating Ambassador's judgment for lack of subject matter jurisdiction.

[3] Ambassador did not litigate before the arbitration tribunal the counterclaim resulting from the cancellation of the SLI tour.

[4] Ambassador's raising of one counterclaim during arbitration did not mean that it necessarily raised all of its counterclaims. In addition, Ambassador was not required to raise the counterclaim by a compulsory counterclaim rule,

[5] and Ambassador did not present the claim as a compulsory counterclaim.

Ambassador was free to bring suit in a separate forum.

[6] The case was remanded with instructions for the district court to reinstate Ambassador's judgment, offset it against Archexpo's, calculate the appropriate interest adjustment, and enter judgment for Ambassador in that amount.

COUNSEL

Leslie R. Weatherhead and James J. Workland, Workland, Witherspoon, Riherd & Brajcich, Spokane, Washington, for plaintiff-appellant, defendant-appellant International Ambassador Programs, Inc.

Roger A. Leishman, Bogle & Gates, Seattle, Washington, for plaintiff-appellee, defendants-appellees Archexpo, et al.

OPINION

HAWKINS, Circuit Judge:

This case arises out of efforts to facilitate travel exchanges between the

United States and republics of the former Soviet Union. International Ambassador Programs ("Ambassador") appeals the district court's ruling vacating a judgment in its favor. The court determined that Ambassador's judgment arose out of the same cause of action as a subsequent judgment in favor of Archexpo Commerce and Industry Centre ("Archexpo"), and therefore was barred as a "prior inconsistent judgment" under the "last-in-time" rule. *See Robi v. Five Platters, Inc.*, 838 F.2d 318, 322 (9th Cir. 1988). We have jurisdiction under 28 U.S.C. § 1291. Because we conclude that the Moscow arbitration and the Ambassador litigation are two distinct disputes arising under two separate agreements, one providing for arbitration and one not, we reverse.

I. BACKGROUND

Ambassador is a Washington non-profit corporation that arranges tours and informational visits in foreign countries, including Russia. It organizes tours under two separate divisions: "Citizen Ambassador Program" ("CAP"), and "State Leadership Initiative" ("SLI"). Archexpo, once a Soviet state enterprise and now a Russian limited partnership, facilitates and expedites tours such as those sponsored by Ambassador in Russia and other former Soviet republics.

Archexpo and Ambassador entered into several agreements relating to tours in Russia. Two are of direct importance here. The first, dated April 28, 1989 ("the April agreement"), called for Archexpo to perform services in connection with Ambassador's CAP tours. The April agreement, later modified in contemplation of visits

by delegations from the Soviet Union to the United States, contains a clause providing that "all disputes and differences without recourse to courts of law shall be referred to the arbitration tribunal with the USSR Trade and Industry Chamber for resolution, such resolution acknowledged as final by the parties." The second agreement, with an effective date of July 1, 1989 ("the July agreement"), was negotiated and executed in the United States and deals with visits by state delegations under Ambassador's SLI program. Unlike its April counterpart, the July agreement was signed only by Archexpo's representative and contains no arbitration clause.

Soon after the first CAP tours organized under the April agreement were complete, a dispute arose. Archexpo claimed it had not been paid for certain fees due

under the April agreement; Ambassador denied that it owed any additional payments and claimed an offset of approximately $20,000 for refunds it paid to tour delegations who were dissatisfied with Archexpo's service. In November 1990, the parties submitted the dispute to arbitration in Moscow, as required by the April agreement.

Ambassador advised the arbitrators that it believed it had separate legal claims against Archexpo which it intended to pursue in the United States. Accordingly, Ambassador filed suit in the District Court for the Eastern District of Washington claiming that Archexpo's sudden cancellation of an SLI delegation was a breach of the July contract (the "SLI suit"). Ambassador filed the separate action instead of submitting a counterclaim regarding the canceled SLI delega-

tion to arbitration because it disputed the tribunal's jurisdiction over the dispute. There is no evidence that Archexpo sought a determination in the Moscow arbitration requiring Ambassador to present any other claims it believed it had for resolution there.

Ambassador filed the SLI suit on November 14, 1990. Archexpo and its officers were served, but chose not to appear or defend. Instead, Archexpo sent a letter to Ambassador's counsel (with a copy to the district court) that referred to the then-pending Moscow arbitration but did not ask the district court to stay or dismiss the litigation or to compel arbitration of the July agreement. Following a motion for summary judgment, Ambassador was awarded judgment in the amount of $493,454 against Archexpo on July 24, 1991 (the "SLI judgment"). Archexpo did not

respond to the motion or appeal the resulting judgment.

Archexpo ultimately prevailed in the Moscow arbitration and on March 10, 1992 was awarded $131,730 against Ambassador. Archexpo then filed an action in the district court to confirm the award, and the judgment was entered on September 8, 1993 in its favor against Ambassador in the amount of $154,159 (the "arbitration judgment").

After the district court confirmed the arbitration award, Ambassador moved to offset Archexpo's arbitration judgment against Ambassador's SLI judgment. Archexpo, raising res judicata issues for the first time, filed a cross-motion to vacate Ambassador's award as a "prior inconsistent judgment" under the "last-in-time" rule. *See Robi*, 838 F.2d at 322.

The district court agreed with Archexpo and vacated the SLI judgment.

II. STANDARD OF REVIEW

The district court's decision that an action is barred by res judicata is reviewed de novo. *International Union v. Karr*, 994 F.2d 1426, 1429 (9th Cir. 1993). Similarly, we review de novo the district court's determination that the dispute over the July agreement was subject to arbitration. *Mediterranean Enters., Inc. v. Ssangyong Corp.*, 708 F.2d 1458, 1462-63 (9th Cir. 1983).

III. SEPARATE AGREEMENTS

Critical to the determination of this appeal is whether the arbitration clause in the April agreement encompasses any subsequent contract, including the July agreement or, rather, whether the two agreements are separate, each subject to

individual interpretation.[1] If the July agreement is a discrete agreement, the lack of an arbitration clause means disputes over the agreement are not subject to arbitration. On the other hand, if the two agreements are merely interrelated

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[1]We note that Archexpo disputes the enforceability of the July agreement because it was signed only by Archexpo's representative. Apparently Russian law requires the signatures of all parties for an agreement to be legally binding. However, there is no indication in the July agreement that it was to be governed by Russian law or that the Archexpo representative who signed it did not have fully authority to bind the partnership. The document, which was negotiated and executed in Spokane, Washington, is a sufficient memorandum of understanding to constitute an enforceable agreement under Washington law. *See* Wash. Rev. Code § 19.36.010 (Washington's Statute of Frauds). We hold the July 1, 1989 document is a legally binding agreement between the parties and consider it as such.

contracts in an ongoing series of transactions, as Archexpo contends, Ambassador should have submitted its claim under the July agreement to the Moscow arbitration, and the district court would have lacked jurisdiction to consider the SLI suit.

[1] There is substantial evidence that the April and July agreements are independent and that the arbitration clause in the April agreement does not control the separate agreements of the parties. The agreements concern two separate types of tours and completely different groups of tourists. The July agreement contains no arbitration clause, indicating an intent to treat it differently than the April agreement. Moreover, the proof necessary to establish Archexpo's Moscow arbitration claims under the April agreement has nothing to do with the dispute under the July agreement.

[2] Archexpo argues that Ambassador's claims under the July agreement were involved in the Moscow arbitration and, specifically, that several arbitration documents make reference to the claims. Mentioned they were, but principally because Ambassador quite specifically reserved the claims for the United States litigation it alerted the Moscow arbitrators it planned to pursue. We hold, therefore, that the July agreement is separate and independent from the April agreement, and that the arbitration clause does not apply to the July agreement. The district court erred when it vacated Ambassador's judgment for lack of subject matter jurisdiction under Fed. Civ. P. 60(b)(4).

IV. *RES JUDICATA*

Ambassador argues that the district court's res judicata analysis was flawed from the outset because it applied the wrong rule. Ambassador contends that in-

stead of determining whether the SLI suit arose out of the same transaction as the arbitration, the district court should have considered whether Ambassador's suit was a permissive or compulsory counterclaim in the arbitration proceeding. *See* Restatement (Second) of Judgments § 22 (1982) ("Restatement § 22").[2]

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[2]Restatement § 22 provides:

§ 22. Effect of Failure to Interpose Counterclaim.

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

Archexpo argues that the district court correctly declined to evaluate the case under Restatement § 22 and instead correctly applied the res judicata analysis from *C.D. Anderson & Co. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987). In that case, this court held that in determining whether a subsequent suit arises from the "same cause of action," and is thus barred by res judicata, courts must consider the following factors:

> (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action;

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[2](continued):

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

(2) whether substantially the same evidence is presented in the two actions;

(3) whether the two suits involve infringement of the same right; and

(4) whether the two suits arise out of the same transactional nucleus of facts.

Id.

[3] The present appeal, however, is distinguishable from *C.D.Anderson*. There, C.D. Anderson, the plaintiff in the second suit (the respondent in the arbitration), raised and litigated in the arbitration the very claims on which its suit was based. Since C.D. Anderson raised its counterclaims during arbitration, Restatement § 22 was inapplicable. Here, in contrast, Ambassador did not litigate before the tribunal the counterclaim resulting from the cancellation of the SLI

tour. It is true that Ambassador claimed it was owed approximately $20,000 for refunds it paid to disgruntled customers; however, this claim, even if characterized as a counterclaim, does not involve the canceled SLI delegation – the counterclaim on which Ambassador's SLI suit was based.

[4] That Ambassador raised one counterclaim during arbitration does not mean that it necessarily raised all of its counterclaims. Nor was Ambassador required to raise the counterclaim by a compulsory counterclaim rule. Contrary to Archexpo's contention, Ambassador's generic statement that Archexpo's inadequate service "led to changes and cancellations in the scheduling and itineraries of delegations, and in one case the complete cancellation of a delegation," did not "raise" the counterclaim before the tribunal. Rather, Ambassador merely informed

the tribunal that it had other legal claims which it was bringing in U.S. district court. Thus, the res judicata principles enunciated in Restatement § 22, and not *C.D. Anderson*, apply to this case.

[5] When Ambassador's claim is evaluated in light of Restatement § 22, the only relevant inquiries are (1) whether Ambassador raised the counterclaim before the arbitration tribunal; and (2) whether the SLI suit would nullify or impair Archexpo's rights under the arbitration judgment. As noted above, there was no rule requiring Ambassador to present the claim as a compulsory counterclaim, and, in fact, it did not do so. Ambassador was, therefore, free to bring suit in a separate forum. Thus, the only remaining inquiry is whether Ambassador's SLI suit would "nullify the initial judgment or would impair rights established in the initial action." Restatement § 22(2)(b).

[6] Archexpo argues that since Ambassador's SLI judgment was larger than Archexpo's arbitration judgment, enforcement of the former would nullify the latter. This contention is meritless. Ambassador's SLI judgment does not undercut the legal basis for Archexpo's original claim, nor does it require vacation of the arbitration judgment. The two judgments simply need to be reconciled; Archexpo would receive a credit of $154,159 from its arbitration award which could be applied toward the $493,454 judgment it owed Ambassador. By offsetting the judgments, both parties would receive the benefits of their respective judgments. We remand this case to the district court with instructions to reinstate Ambassador's judgment, offset it against Archexpo's, calculate the appropriate interest adjustment and enter judgment for Ambassador in that amount.

Because we have concluded the Restatement § 22's counterclaim rule permits the SLI suit, we need not reach the question of whether the last-in-time rule requires that the arbitration judgment be enforced and the earlier SLI judgment be invalidated.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF THE ARBITRATION BETWEEN,	)
	) **CIVIL CASE NOS.**
ARCHEXPO COMMERCE AND INDUSTRY CENTRE,	) **CS-93-087-FVS**) **CS-90-483-RJM**
Petitioner,	) **ORDER DENYING**
v.	) **MOTION TO RECONSIDER**
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	) **May 10, 1994**
Respondent.	)

THIS MATTER came before the Court without oral argument on May 10, 1994, based upon International Ambassador's mo-

tion to reconsider.[1] International Ambassador Programs, Inc. ("IAP") is represented by James J. Workland and Gregory J. Workland. Archexpo Commerce and Industry Centre ("Archexpo") is represented by Roger A. Leishman.

I. BACKGROUND

On February 4, 1994, the Court denied International Ambassador's Motion to Stay Enforcement of Judgment on Foreign Arbitral Award and granted Archexpo's Motion To Vacate Judgment.[2] IAP now moves to reconsider.

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[1]The Court determines that oral argument is not warranted. LR 7(h)(3).

[2]In CS-90-483-RJM, the Order Denying Motion to Stay and Granting Motion to Vacate is docketed as Ct. Rec. 21. In CS-93-087, the order is docketed as Ct. Rec. 36. Although the substance of both orders is the same, there are slight differences in pagination.

IAP makes three arguments in support of its motion. First, IAP submits that the Court erred by ruling that the judgments entered in CS-90-483-RJM and CS-93-087-FVS involve the same cause of action. Second, IAP asserts that the Court erred by ruling that the decision of the Arbitration Tribunal of the USSR Chamber of Commerce and Industry to exercise exclusive authority over commercial disputes between IAP and Archexpo is entitled to preclusive effect under the last-in-time rule. Finally, IAP argues that Archexpo waived the right to arbitrate the claim at issue in CS-90-483-RJM by failing to appear in that action.

II. RULING

A. Same Cause of Action

During July, 1991, IAP obtained a judgment against Archexpo in CS-90-483-RJM. On March 10, 1992, the Arbitration

Tribunal ruled in favor of Archexpo. The Arbitration Tribunal's decision was subsequently confirmed by this Court.

IAP continues to insist that the claims before the Court in CS-90-483-RJM are not part of the cause of action decided by the Arbitration Tribunal. As Archexpo points out, however, that contention was specifically rejected in the Court's previous order. Nothing has been presented which would justify reconsideration of that ruling.

B. Preclusive Effect

The last paragraph of the Order Denying Motion to Stay begins with the following sentence. "District courts do not have jurisdiction to decide claims which are subject to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards." Id. at 16. Viewed by itself, that language could

be construed to mean that district courts never have jurisdiction over disputes which are covered by an arbitration agreement – a proposition which is obviously incorrect. However, when the sentence quoted above is read in context, it is clear that the Court intended to say something quite different.

At the time the motions to stay and vacate were decided, this Court was faced with inconsistent rulings regarding jurisdiction. As the Court noted, "The judge who granted judgment on IAP's behalf [in CS-90-483-RJM] assumed he had jurisdiction. By contrast, the arbitrators decided that all commercial disputes between Archexpo and IAP were subject to arbitration in Moscow." (Order Denying Motion to Stay at 15.) Confronted with inconsistent rulings regarding jurisdiction, this Court was bound by the last in time. Robi

v. Five Platters Inc., 838 F.2d 318, 328 (9th Cir.1988); Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1530 (9th Cir.1985). That meant that this Court (and the parties before it) were required to defer to the Arbitration Tribunal's decision that it had exclusive jurisdiction over commercial disputes between IAP and Archexpo. Thus, the judgment in CS90-483-RJM had to be vacated.

If principles of res judicata apply, IAP argues that they should have been applied when this Court was deciding whether to confirm the arbitration award in Archexpo's favor. IAP now contends that Judge McNichol's decision to exercise jurisdiction should have been given preclusive effect.

Whether IAP's argument would have been persuasive if raised during the confirmation proceedings is difficult to as-

sess. The fact remains, however, that IAP failed to raise it at that point. Thus, this Court's implicit determination in the confirmation proceedings (i.e., that Judge McNichol's decision to exercise jurisdiction was not res judicata) is now entitled to preclusive effect. Americana Fabrics, Inc., 754 F.2d at 1530 ("the implicit . . . decision of the second court, to the effect that the first court's judgment is not res judicata, is itself res judicata and therefore binding on the third court").

Looking back, it is clear that Judge McNichol's decision was that of the "first court." Once IAP decided not to appeal this Court's order confirming the arbitration award, the decision of the Arbitration Tribunal became that of the "second court." Consequently, for purposes of deciding the motions to stay and

to vacate, this Court was the "third court" to consider the question of jurisdiction. As such, this Court was bound by the last-in-time rule.

C. Waiver

IAP argues that Archexpo waived arbitration of the claims at issue in CS-90-483-RJM by failing to appear. However, in view of the Court's determination that the judgment in CS-90-483-RJM must be vacated under the last-in-time rule, IAP's argument is without merit.

IT IS HEREBY ORDERED:

International Ambassador's motion to reconsider[3] is **denied.**

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[3]In CS-90-483-RJM, the motion to reconsider is docketed as Ct. Rec. 23. In CS-93-087, the motion to reconsider is docketed as Ct. Rec. 37.

IT IS SO ORDERED. The Clerk is hereby directed to file this order and furnish copies to counsel.

DATED this 10th day of May 1994.

FRED VAN SICKLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF THE ARBITRATION BETWEEN,	)
	) **NO.**
ARCHEXPO COMMERCE AND INDUSTRY CENTRE,	) **CS-93-087-FVS**
	) **ORDER**
Petitioner,	) **DENYING**
	) **MOTION TO**
v.	) **STAY AND**
	) **GRANTING**
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	) **MOTION TO**) **VACATE**
	) **February 3,**
Respondent.	) **1994**

THIS MATTER came before the Court on January 7, 1993, for consideration of two motions. In CS-93-087-FVS, International

Ambassador Programs, Inc. ("IAP") seeks to stay the judgment which Archexpo Commerce and Industry Centre ("Archexpo") obtained against it.[1] In CS-90-483-RJM, Archexpo seeks to vacate a judgment which IAP obtained against it.[2]

IAP was represented by James J. Workland and Gregory J. Workland. Archexpo was represented by Roger A. Leishman.

I. BACKGROUND

IAP is a Washington non-profit corporation that arranges citizen delegations to various countries, including the former Soviet Union. Archexpo is a Russian limited partnership. During 1989, IAP and Archexpo entered into a series of written agreements. Archexpo promised to provide certain services to IAP-sponsored tour groups, and IAP promised to pay for the

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[1](Ct. Rec. 23).

[2](Ct. Rec. 14).

services which Archexpo rendered. Disputes which the parties were unable to resolve were to be referred to the Arbitration Tribunal of the USSR Chamber of Commerce and Industry.

In fact, a dispute arose. The parties could not agree on the amount of compensation which IAP owed Archexpo. Early in 1990, Archexpo requested arbitration.

IAP hired an American law firm to defend its interests in the arbitration proceedings, which were scheduled to take place in Moscow during November, 1990. Prior to the hearing, IAP's attorneys submitted a fifty-five page "Pre-hearing Brief." In addition to denying the existence of jurisdiction and the validity of Archexpo's claims, IAP asserted that Archexpo failed to provide services which the parties had agreed upon. For example, "arrangements for hotels, interpreters, transportation and cultural and profes-

sional programs were not made or were changed at the last minute, which led to changes and cancellations in the scheduling and itineraries of delegations, and in one case the complete cancellation of a delegation. (Pre-Hearing Brief at 5 (emphasis added).) As a result, IAP insisted that it "was compelled to pay refunds totaling $20,240 to a number of dissatisfied delegates." Id.

IAP considered filing a counterclaim against Archexpo. However, because IAP denied that it was subject to the jurisdiction of the Arbitration Tribunal, its attorneys told the arbitrators that IAP intended to file a civil action against Archexpo in the United States. (Pre-hearing Brief at 5 n.5.)

IAP was as good as its word. On November 14, 1990, it filed a complaint against Archexpo in this district, alleging that Archexpo had wrongfully refused

to arrange accommodations for an eighty-person delegation referred to as the "Peterson State Leadership Initiative."[3] Copies of the summons and complaint were served upon Archexpo representatives at the arbitration hearing.

The hearing began on November 20, 1990, and lasted two days. At the conclusion of the hearing, the arbitrators took the case under advisement. While the arbitrators were reviewing the matter, IAP moved for summary judgment in the action it had filed in this district. Notice of the motion was mailed to IAP representatives during May, 1991.

According to Archexpo, the notice was mailed to the address at which the arbitration hearing was held. That was not Archexpo's correct address. Nevertheless,

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[3]The complaint was docketed as cause number CS-90-483-RJM.

it is clear that Archexpo learned of the motion. One of its representatives sent a letter to IAP's Washington counsel (with a copy to the presiding judge) arguing that the Arbitration Tribunal had exclusive jurisdiction over the disputes between Archexpo and IAP.

Archexpo neither appeared in the civil action filed here, nor resisted IAP's motion for summary judgment – other than to send the letter referred to above. As a result, the presiding judge granted IAP's motion for summary judgment during July, 1991. Judgment was entered against Archexpo in the amount of $493,454.23.

The arbitrators issued a written opinion on March 10, 1992. They noted that IAP claimed $20,240 in damages as a result of Archexpo's failure to provide agreed-upon services to tour participants. (Opinion at 24.) Although the arbitrators acknowledged that IAP had said that

it intended to file an action in the United States, the arbitrators treated IAP's allegations as a counterclaim, which they denied. Id. Ultimately, the arbitrators ruled that IAP owed Archexpo the sum of $131,730.00 (U.S.). Id.

Archexpo petitioned this Court for confirmation of the arbitrators' ruling pursuant to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. 9 U.S.C. § 207. Archexpo's petition was granted. See Order Confirming Award (Ct. Rec. 17).[4] IAP did not

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[4]"The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207. See Ministry of Defense of Islamic Republic v. Gould, Inc., 969 F.2d 764, 770 (9th Cir.1992) (emphasizing that foreign arbitration awards are subject to only limited judicial review).

seek review of the decision confirming the foreign arbitral award.

II. RULING

A. Motion to Stay

Archexpo maintains that the judgments entered in CS-90-483-RJM and CS-93-087-FVS are inconsistent. (In other words, the same cause of action gave rise to both judgments, and the first cannot be reconciled with the second.) Citing the last in-time rule, Archexpo argues that the second judgment is now entitled to preclusive effect.

When the same claim or issue is litigated in two courts, the second court to render a judgment is required by the doctrine of res judicata to give preclusive effect to the first court's judgment. Americana Fabrics, Inc. v. L & L Textiles, Inc., 754 F.2d 1524, 1529 (9th Cir.1985). Sometimes, however, the second court does not do so. It may be because the question

of res judicata is not raised in the second action, or it may be because the second court decides – rightly or wrongly – that the first judgment is not entitled to preclusive effect. Robi v. Five Platters, Inc., 838 F.2d 318, 327 (9th Cir.1988) (citing Americana Fabrics, Inc., 754 F.2d at 1529). Should the matter then come before a third court, that court is faced with conflicting judgments. In such circumstances, the third court must give preclusive effect to the last judgment to be entered. Robi, 838 F.2d at 1530; Americana Fabrics, Inc., 754 F.2d at 1530.

The last-in-time rule applies only if two judgments are based upon the same cause of action. The question of "sameness" turns upon the following factors:

(1) whether rights created by the first judgment are impaired or destroyed by the second;

(2) whether the two actions involve substantially the same evidence;

(3) whether the two actions allege infringements of the same right; and

(4) whether the two actions arise out of the same transactional nucleus of facts. C.D. Anderson & Co. v. Lemos, 832 F.2d 1097, 1100 (9th Cir.1987).

Of the four factors, the last is certainly the most important. International Union v. Karr, 994 F.2d 1426, 1429 (9th Cir.1993). Indeed, if the two actions arise out the same transaction, it may be unnecessary to consider the other criteria. Id. at 1430.

The Court of Appeals uses the criteria set forth in the Restatement (Second) Judgments to determine whether two actions stem from the same transaction or series of transactions. Karr, 994 F.2d at 1429; Western Sys., Inc. v. Ulloa, 958 F.2d 864,

871 (9th Cir.1992), cert. denied, ___ U.S. ___, 113 S.Ct. 970, 122 L.Ed.2d 125 (1993). The Restatement explains, "The expression 'transaction, or series of connected transactions,' is not capable of a mathematically precise definition; it invokes a pragmatic standard to be applied with attention to the facts of the case[]." Restatement (Second) Judgments § 24(2) cmt. b. (1982). Accordingly, in attempting to determine whether two transactions are the same, courts should consider whether the events in question are "related in time, space, origin, or motivation," Restatement (Second) Judgments § 24(2), "whether they form a convenient trial unit," id., and whether treating the transactions as a unit "conforms to the parties' expectations or business understanding . . . ." Id.

IAP attempts to demonstrate the existence of two separate transactions by arguing that the judgment entered in CS-90-483-RJM was based upon a contract other than the one considered by the arbitrators. As authority, IAP cites a writing which was signed by an Archexpo representative at some unspecified point during the Spring of 1989. It purports to establish the services and compensation to be provided by the parties with respect to delegations sent to Russia under an IAP program described as the "State Leadership Initiative."

In IAP's opinion, there are at least two reasons why this writing reflects a separate transaction. First, it governed tours organized under the "State Leadership Initiative," whereas the agreement before the arbitrators involved tours organized under the "Citizen Ambassador Pro-

gram." Second, this writing contained no provision for arbitration, whereas a number of the agreements before the arbitrators did.

However, even if correct, the distinctions relied upon by IAP do not establish separate transactions. For one thing, all of the writings at issue here were executed during the same period of time, and were motivated by essentially the same business objectives. For another, it is clear that the claims could have been tried together, and that IAP's decision to initiate a separate action in the United States has placed this Court in an awkward position. Finally, at the time IAP and Archexpo first began doing business together, they understood that IAP would be sending a series of delegations, and that Archexpo would arrange accommodations for each. It does not appear that

the parties expected to negotiate a new contract for each delegation; rather, they anticipated a continuing commercial relationship spanning many months.

It follows that the judgments at issue here arose from the same transaction or series of transactions. See Karr, 994 F.2d at 1429-30; Western Sys., Inc., 958 F.2d at 871. Archexpo is correct is asserting that the fourth C.D. Anderson factor weighs heavily in its favor.

Archexpo's position is bolstered by the remaining C.D. Anderson criteria. The first judgment assumed that disagreements between the parties could be litigated in the United States. By contrast, the arbitrators concluded that they had exclusive authority to decide such disputes. (Opinion at 11.) If the arbitrators were correct, this court lacked subject matter jurisdiction over IAP's claims against

Archexpo.[5] As a result, the rights created by the first judgment were at least impaired (and possibly destroyed) by the second judgment. See C.D. Anderson & Co., 832 F.2d at 1100.

IAP denies that the two actions involve substantially the same evidence, or that both allege infringement of the same right. Although IAP advances its thesis with much vigor, there is virtually no support for it in the record. In fact, both actions were driven by two (essentially) indivisible issues: Did Archexpo

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[5]See Astor Chocolate Corp. v. Mikroverk Ltd., 704 F.Supp. 30, 35 (E.D.N.Y. 1989) (once a federal court rules that a claim is subject to arbitration in a foreign county, the court is divested of subject matter jurisdiction); Eastern Europe, Inc. v. Transportmaschinen, Export-Import, Inc., 658 F.Supp. 612, 614 (S.D.N.Y.1987) (same).

provide the services agreed upon, and did IAP owe Archexpo anything?

In sum, application of the C.D. Anderson criteria leads – inexorably – to one conclusion. The judgments entered in CS-90-483-RJM and CS-93-087-FVS do indeed involve the same cause of action. It follows that the last in time (i.e., that entered in CS-93-087-FVS) is entitled to preclusive effect. IAP's motion for a stay must be denied.

B. Motion to Vacate

Archexpo moves to vacate the judgment entered against it in CS-90-483-RJM. Archexpo argues that the judgment is void; that it can no longer be given prospective application; and that it would be inequitable to allow it to stand. Fed.R.Civ.P. 60(b).

1. Timeliness

Since Archexpo is not seeking relief under the first three clauses of Rule 60(b), it need not show that its motion was brought within one year of the judgment it moves to vacate. Instead, insofar as the fifth and sixth clauses are concerned, Archexpo must show only that its motion was filed "within a reasonable time." Fed.R.Civ.P. 60(b).[6]

IAP initiated this action less than a week before the arbitration hearing commenced in Moscow. IAP moved for summary judgment after the arbitrators had taken the matter under advisement, but before

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[6]If a judgment is void, it may be attacked at any time. In re Center Wholesale, Inc., 759 F.2d 1440, 1447-48 (9th Cir.1985). Consequently, a Rule 60(b)(4) motion may not be resisted as untimely.

they reached a decision. Thus, at the time IAP obtained its judgment, IAP was well aware of the arbitration proceeding and the risk of a ruling contrary to its interests. (Indeed, it appears that IAP filed its complaint as a hedge against the possibility of an adverse arbitration award.)

IAP must have realized that Archexpo would seek confirmation of an arbitration award if the arbitrators ruled in Archexpo's favor. Now that an adverse award has been entered and confirmed, IAP cannot seriously claim to be surprised by Archexpo's motion to vacate.

Archexpo had no reason to bring a motion to vacate IAP's judgment until it knew whether the arbitrators would rule in its favor and whether the arbitration award would be confirmed by this Court. The record reflects that Archexpo's mo-

tion to vacate was filed in cause 90-483 on December 16, 1993, approximately four months after the arbitration award was confirmed. Under the circumstances, that is not an unreasonable delay.

2. 60(b)(5)

Rule 60(b)(5) provides that a judgment may be vacated when "it is no longer equitable that [it] should have prospective application." Since IAP has yet to collect its judgment for money damages, Archexpo argues that 60(b)(5) is applicable.

It is well established, however, that a judgment for damages is retrospective in nature. See Almond Hill School v. U.S. Dept. of Agriculture, 768 F.2d 1030, 1034 (9th Cir.1985). Rule 60(b)(5) simply does not provide a vehicle for attacking a judgment which grants retrospective relief. See 11 Charles A. Wright and Arthur R.

Miller, Federal Practice and Procedure § 2863 (1973) (Rule 60(b)(5) applies to judgments which have prospective effect, as opposed to "those that offer a present remedy for a past wrong"). Thus, Archexpo's reliance upon Rule 60(b)(5) is misplaced.

3. 60(b)(6)

Rule 60(b)(6) provides that a judgment may be vacated for "any other reason justifying relief from the operation of the judgment." Although Rule 60(b)(6) appears open-ended, it has been construed very narrowly. For example, it will rarely be available where a party forgoes recourse to normal legal procedures. United States v. Alpine Land & Reservoir. Co., 984 F.2d 1047, 1049 (9th Cir.), cert. denied, ___ U.S. ___, 114 S.Ct. 60, 126 L.Ed.2d 29 (1993). As the Court of Appeals explained, Rule 60(b)(6) requires

the moving party to show that it was injured, and "that circumstances beyond its control prevented timely action to protect its interests." Id.

Here, Archexpo could have retained local counsel to oppose IAP's motion. It chose not to do so. It is not, therefore, entitled to relief under Rule 60(b)(6).

4. 60(b)(4)

Archexpo's motion raises three Rule 60(b)(4) issues. First, were the summons and complaint served properly? Second, did improper service of IAP's motion for summary judgment deny Archexpo due process? Third, was this Court stripped of subject matter jurisdiction once Archexpo invoked its right to arbitration?

Archexpo concedes that its representatives were served with copies of the summons and complaint when they appeared

for the arbitration hearing in Moscow.[7] Archexpo contends, however, that parties are immune from service during such proceedings. As authority, it cites Anderson v. Ivarsson, 77 Wn.2d 391, 462 P.2d 914 (1969). There, the state supreme court noted that "nonresident witnesses . . . are privileged from service of summons or process in an unrelated civil action while temporarily within this state for the pur-

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[7]IAP claims that service was properly effected under 28 U.S.C. § 1608(b). That statute lists circumstances in which either a "foreign state" or an "agency or instrumentality of a foreign state" may be subject to jurisdiction in the United States. Since Archexpo does not fit the definition of either a "foreign state" or an "agency or instrumentality of a foreign state," 28 U.S.C. § 1603(b); see Chuidian v. Philippine Nat'l Bank, 912 F.2d 1095, 1100 (9th Cir. 1990), § 1608(b) would appear to be inapplicable.

pose of attending upon the trial of a pending civil suit." Id. at 392.

Although Anderson may indeed protect nonresidents who travel to this state to participate in judicial proceedings, Archexpo has failed to establish that the Anderson rule – or one comparable to it – applies to international arbitration hearings. Consequently, Archexpo's personal jurisdiction argument is not well taken.

Failure to provide notice of a hearing may deny the opposing party due process, thereby rendering the judgment void. Cf. In re Center Wholesale Inc., 759 F.2d 1440, 1448-49 (9th Cir.1985) (due process denied where notice came too late to permit party to obtain adequate protection of its interests). Although IAP concedes that copies of the pleadings relevant to its motion for summary judgment were mailed to the wrong address, it is undis-

puted that Archexpo learned of IAP's motion in time to respond had it chosen to do so. Thus, Archexpo was not denied due process.

Judgment was entered against Archexpo in cause 90-483 because the presiding judge assumed he had jurisdiction over the subject matter of the dispute. As a general rule, a district court's determination that it has subject matter jurisdiction is entitled to preclusive effect, which means it is not subject to collateral attack. See Watts v. Pinckney, 752 F.2d 406, 410 (9th Cir.1985) (citing Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 376, 60 S.Ct. 317, 319, 84 L.Ed. 329 (1940)).

Archexpo's motion to vacate is not a collateral attack, however. It is a proceeding brought in the court which entered the judgment; between the parties

to the judgment; in which the party against whom the judgment was entered moves to vacate the judgment. As such, it constitutes a direct attack, and is not barred by the Chicot rule. Watts, 752 F.2d at 410.

Moreover, a determination regarding jurisdiction should not be deemed conclusive if "[a]llowing the judgment to stand would substantially infringe the authority of another tribunal or agency of government." Restatement (Second) Judgments § 12(2) (1982) (emphasis added). See Commodities Export Co. v. U.S. Customs Service, 957 F.2d 223, 228 (6th Cir.1992) (quoting Restatement). That principle is particularly relevant here, given the "strong presumption in favor of enforcement of freely negotiated contractual choice-of-forum provisions." Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,

Inc., 473 U.S. 614, 631, 105 S.Ct. 3346, 3356, 87 L.Ed.2d 444 (1985). Indeed, the federal policy favoring arbitral dispute resolution "applies with special force in the field of international commerce." Id.

IAP sued Archexpo in this district in an effort to circumvent the arbitration clauses contained in its various agreements with Archexpo. The judgment IAP ultimately obtained not only infringes upon the authority of the Arbitration Tribunal of the USSR Chamber of Commerce and Industry, it also contravenes the policies set forth above. As a result, Archexpo is not bound by the jurisdictional determination implicit in IAP's judgment.

At this juncture, the Court is faced with inconsistent rulings regarding jurisdiction. (The judge who granted judgment on IAP's behalf assumed he had jurisdiction. By contrast, the arbitra-

tors decided that all commercial disputes between Archexpo and IAP were subject to arbitration in Moscow.) Because both decisions arise from the same cause of action,[8] the last-in-time rule dictates that the most recent shall be given preclusive effect. See Americana Fabrics, 754 F.2d at 1530 (an order can have both "claim-preclusive" and "issue-preclusive" effect).

District courts do not have jurisdiction to decide claims which are subject to arbitration under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. See McCreary Tire & Rubber Co. v. CEAT S.p.A., 501 F.2d 1032, 1038 (3d Cir.1974); Astor Chocolate Corp. v. Mikroverk Ltd., 704 F.Supp. 30, 35 (E.D.N.Y.1989); Eastern Europe, Inc. v.

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[8]See supra p. 9.

Transportmaschinen, Export-Import, Inc., 658 F.Supp. 612, 614 (S.D.N.Y.1987).[9] Consequently, this Court did not have authority to resolve the allegations set forth in IAP's complaint. The judgment against Archexpo must be vacated, and IAP's complaint dismissed.

IT IS HEREBY ORDERED:

1. International Ambassador's Motion to Stay Enforcement of Judgment on Foreign Arbitral Award (Ct. Rec. 23) is **denied**.

2. Archexpo's Motion To Vacate Judgment (Ct. Rec. 28) is **granted**. Inter-

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[9]But cf. David L. Threlkeld & Co. v. Metallgesellschaft Ltd., 923 F.2d 245, 253 n.2 (2nd Cir.) (declining to decide whether an action must be dismissed for lack of subject matter jurisdiction once a court orders arbitration), cert. dismissed, ___.S. ___, 112 S.Ct. 17, 115 L.Ed.2d 1094 (1991).

national Ambassador's judgment is vacated, and its claims against Archexpo are **dismissed without prejudice**.

IT IS SO ORDERED. The Clerk is hereby directed to file this order and furnish copies to counsel.

DATED this 3rd day of February 1994.

FRED VAN SICKLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF THE ARBITRATION BETWEEN,	
	NO. CS-93-087-FVS
ARCHEXPO COMMERCE AND INDUSTRY CENTRE,	
Petitioner,	**ORDER CONFIRMING AWARD**
v.	
	August 11, 1993
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	
Respondent.	

Archexpo Commerce and Industry Centre (hereinafter "Archexpo") petitions the Court pursuant to 9 U.S.C. § 207 to con-

firm a foreign arbitral award entered against International Ambassador Programs, Inc. (hereinafter "IAP") in the amount of $131,730. Archexpo is represented by Patricia H. Char and Roger A. Leishman; IAP is represented by James J. Workland and Gregory J. Workland. For the reasons set forth below, the petition to confirm is granted.

I. BACKGROUND

IAP is a Washington non-profit corporation that arranges delegations to various countries. Archexpo is a Russian limited partnership. During 1989, IAP and Archexpo entered into a series of five written agreements. Archexpo promised to provide certain services to IAP delegations, and IAP promised to pay for the same.

The documents in question are dated April 28, May 15, August 10, August 22, and September 30, 1989. IAP Vice Presi-

dent Norman Swanson signed three contracts (April 28, August 10, and August 22); IAP Director of Soviet Programs Brad Chatfield signed two (May 15 and September 30).

Three of the agreements between IAP and Archexpo provided for arbitration by the Arbitration Tribunal of the USSR Chamber of Commerce and Industry. Consequently, when disputes arose regarding the amount(s) IAP owed Archexpo, the matter was submitted to the Arbitration Tribunal.

Arbitration hearings were held in Moscow during November, 1990. Both sides were represented by counsel. On March 10, 1992, the arbitrators issued a written ruling in favor of Archexpo in the amount of 131,730.

II. RULING

Archexpo's request for confirmation of the arbitrators' decision is governed

by The Convention on the Recognition and Enforcement of Foreign Arbitral Awards on June 10, 1958. 9 U.S.C. § 201. Thus, the Court's discretion is limited. See Ministry of Defense v. Gould Inc., 969 F.2d 764, 770 (9th Cir.1992). "The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [New York] Convention." 9 U.S.C. § 207.

The grounds for refusal are listed in Article V of the Convention. See Gould, 969 F.2d at 770. Two are at issue here. IAP argues that the parties to the agreements were under an incapacity within the meaning of Article V(1)(a), and that recognition of the award would by contrary to the public policy of the United States. Article V(2)(b).

A. Incapacity

Under Article V(1)(a), recognition may be refused if a party to an arbitration agreement "was under some incapacity" "under the law applicable to" it. 9 U.S.C. § 201. IAP makes two "incapacity" arguments.

1. Registration in U.S.S.R.

The first of the four agreements was signed on April 28, 1989. Because Archexpo was not registered as "a participant in foreign economic relations in the U.S.S.R." at that time, IAP contends that the agreement of April 28 is invalid. IAP's argument fails for two reasons. First, when the parties signed the April 28 contract, they understood that Archexpo was not registered. The contract specifically provides that it will be effective "from the date of registration of the Soviet party." (Agreement on Rep-

resentation (April 28, 1989) at 2.) Registration occurred on May 6, 1989.

Second, IAP has failed to demonstrate that the arbitrators' award would be undermined if the April 28 agreement is invalid. As Archexpo notes, other contracts signed by the parties contained arbitration clauses. (See, e.g., Agreement (August 22, 1989) at 2.) Thus, IAP would have been required to submit its disputes with Archexpo to the Arbitration Tribunal whether or not the April 28 contract existed. In addition, while the April 28 agreement figured in the arbitrators' decision, the award itself was based upon the extended commercial relationship between the parties. (Arbitration Tribunal Opinion at 15-24.)

2. Agent Authority

IAP next argues that its representatives in Moscow were not authorized to bind it to the terms contained in the sev-

eral agreements. According to IAP, its bylaws provide that only its President (or some other person designated by its board of directors) may execute contracts on its behalf.

IAP made essentially the same argument during arbitration, but the arbitrators found it unpersuasive for three reasons. In their opinion, IAP's Moscow representatives had actual authority under Washington law to make the now-disputed agreements. Moreover, if the agents did not have actual authority, they had apparent authority. Finally, even if the agents had no authority to sign the documents in question, IAP ratified the contracts. (Arbitration Tribunal Opinion at 12-14.)

IAP urges this Court to substitute its judgment on the matter of agent authority for that of the arbitrators. However, IAP has failed to establish that

this Court is permitted to do so. See International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial, 745 F. Supp. 172, 182 (S.D.N.Y. 1990) (rejecting argument that United States courts may "undertake a de novo inquiry into whether the law the arbitrators said they were using was or was not properly applied by them"). Consequently, given the strong presumption in favor of foreign arbitral awards, see Gould, 969 F.2d at 770, this Court declines to review the merits of the arbitrators' decision.

B. Public policy

Article V(2)(b) provides that a foreign arbitral award may be refused recognition if, "[R]ecognition and enforcement of the award would be contrary to the public policy of [the forum state]." 9 U.S.C. § 201. IAP argues that section V(2)(b) should be invoked here because the award

was procured through fraud, and the arbitrators misapplied Washington law.

Although this circuit has not addressed the public policy defense, the Second Circuit has. In doing so, the Second Circuit noted that the purpose of the New York Convention" is 'to encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standard by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory countries."' Waterside Ocean Navigation Co., Inc. v. International Navigation Ltd., 737 F.2d 150, 152 (2d Cir.1984) (quoting Scherk v. Alberto-Culver Co., 417 U.S. 506, 520 n.15, 94 S. Ct. 2449, 2457 n.15, 41 L.Ed.2d 270 (1974)). Consequently, in the Second Circuit, the public policy defense is construed narrowly. Id. Recognition will be denied only if "enforcement would violate

our 'most basic notions of morality and justice.'" Id. (quoting) [sic.] (quoting Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 976 (2d Cir.1974)).

There is no reason to believe the Ninth Circuit will reject its sister circuit's test. Nevertheless, assuming the Second Circuit's standard is adopted, how does the Court determine what conduct violates "our most basic notions of morality and justice?"

Archexpo has failed to cite a single instance in which the public policy defense has been invoked to deny recognition of a foreign arbitral award. In fact, courts have uniformly rejected defenses based upon Article V(2)(b). See, e.g., Waterside, 737 F.2d at 152 (fact that party to arbitration presented inconsistent testimony at different proceedings did not

violate basic notions of morality and justice); Parsons & Whittemore Overseas Co. v. Societe Generale de l'Industrie du Papier, 508 F.2d 969, 976 (2d Cir.1974) (fact that government agency withdrew funding for project in Egypt after Arab-Israeli Six Day War did not mean that American corporation was required to abandon the project in the interest of public policy); Brandeis Intsel Ltd. v. Calabrian Chemicals Corp., 656 F. Supp. 160, 165 (S.D.N.Y. 1987) (holding that "manifest disregard of law" defense is unavailable under Article V(2)(b)). Notwithstanding this substantial body of authority, IAP urges the Court to deny recognition.

IAP first contends it was coerced into signing the agreements which led to the arbitrators' award. That allegation must be viewed in context, however. IAP has extensive experience in the field of

international travel; moreover, IAP selected the representatives which went to Moscow to work on its behalf. Thus, while IAP may have reason to complain of "sharp dealing," it has failed to establish that the contracts were so completely coerced (or so utterly fraudulent) that the arbitrators' decision to enforce them violates basic notions of morality and justice.

In the alternative, IAP argues that the arbitrators misapplied Washington law. However, section V(2)(b) does not permit this Court's to critique the arbitrators' legal analysis. See International Standard Electric Corp., 745 F. Supp. at 182. Even if this Court could, the record reflects that the arbitrators made a conscientious effort to apply Washington law.

C. Interest

Archexpo is entitled to post-award, pre-judgment interest. Waterside, 737 F.2d at 154.

IT IS HEREBY ORDERED:

1. Archexpo's petition to confirm the arbitration award entered against International Ambassador Programs, Inc., in the amount of $131,730 by the Arbitration Tribunal of the USSR Chamber of Commerce and Industry in Case No. 69/1990 on March 10, 1992, is **granted**.

2. Archexpo is awarded pre-judgment interest from March 11, 1992.

3. The parties shall attempt to agree upon the amount of pre-judgment interest to which Archexpo is entitled.

A. If the parties are able to agree upon a sum within twenty-one days of entry of this order, they shall submit a stipulated order for the Court's consideration.

B. If the parties are unable to agree upon a sum within twenty-one days, each party shall submit its

calculations with respect to pre-judgment interest to the Court within thirty days of entry of this order.

IT IS SO ORDERED. The Clerk is hereby directed to file this order; furnish copies to counsel; and enter judgment and close the file once the matter of pre-judgment interest has been decided.

DATED this 11Th day of August 1993.

_____

FRED VAN SICKLE
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

IN THE MATTER OF THE ARBITRATION BETWEEN,	
ARCHEXPO COMMERCE AND INDUSTRY CENTRE,	**AMENDED JUDGMENT IN A CIVIL CASE**
Plaintiff,	**CS-93-087-FVS**
v.	**September 8, 1993**
INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	
Defendant.	

This action came to review before the Court. The issues have been reviewed and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that per stipulation, Archexpo Commerce and Industry Centre is awarded pre-judgment interest in the amount of $22,429.00, resulting in a total judgment of $154,159.00.

DATED: September 8, 1993.

JAMES R. LARSEN, Clerk

by: _____

Annie Smith, Deputy

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,	**CIVIL CASE NO. CS-90-0483-RJM**
Plaintiff,	**ORDER AND JUDGMENT**
v.	**July 24, 1991**
ARCHEXPO, a Company, Agency or Instrumentality of the USSR; BORIS KHLEBIN, of Moscow, USSR; and ANDREI SCHERBAKOV, of Moscow, USSR, as Agents of ARCHEXPO,	
Defendants.	

The Summons and Complaint in the above-entitled action, having been duly served on Defendant Archexpo, Defendant having made no appearance, answer or other defense, and Plaintiff having appeared

by James J. Workland, its attorney, and having moved for an Order under Rule 56(a) of the Federal Rules of Civil Procedure, for a summary judgment directing that judgment be entered herein in favor of Plaintiff on the ground that Defendant Archexpo has no defense to the action, and this motion having come on regularly to be heard before the above-entitled Court on June 10, 1991, and it appearing that the notice of motion was given to Defendant Archexpo pursuant to Rule 56(c) of the Federal Rules of Civil Procedure, the Court having carefully considered the motion, affidavits, exhibits, pleadings, and the memorandum in support on file, and the Court having found that there is no genuine issue as to any material fact, and that Plaintiff is entitled to judgment as a matter of law; therefore,

IT IS ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Summary Judgment be and the same hereby is granted; and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff recover from Defendant Archexpo the sum of $493,454.23, as set out in the attached Schedule of Damages, with interest thereon from the date of judgment.

DONE IN OPEN COURT this 24th day of July, 1991.

_____

J U D G E

Presented by:

WORKLAND, WITHERSPOON & RIHERD

_____

JAMES J. WORKLAND

Attorneys for Plaintiff

The court will consider the proposed Findings of Fact to be a certification of undisputed facts by plaintiff's counsel.

_____

Robert J. McNichols

United States District

Judge

THE ARBITRATION TRIBUNAL OF THE USSR

CHAMBER OF COMMERCE

OPINION

Case No. 69/1990

March 10, 1992

Complaint by Archexpo, USSR Architects' Union, Moscow, against International Ambassador Program Inc., a US corporation, Spokane, for the payment of debt in the amount of $277,237 (US).

FACTS

On March 19, 1990 the Arbitration Tribunal of the USSR Chamber of Commerce received a complaint by Archexpo, a commercial center of the USSR Architects' Union, Moscow, against Citizen Ambassador, a US corporation, Spokane, WA, for payment due in the amount of $276,000 (US). The amount represents the value of unpaid services rendered by the plaintiff under the contracts between the parties.

In its complaint Archexpo makes the following assertions:

On April 28, 1989 the plaintiff and the defendant signed a representation agreement. The agreement provided that the plaintiff would render services to the defendant's professional tour groups in exchange for valuable consideration.

On May 15, 1989 the parties signed a contract providing that each party would pay for the services rendered to tour groups sent by the other party.

On August 22, 1989, the parties signed another cooperation agreement where the plaintiff promised to render services to the defendant and the defendant promised to pay for those services.

Archexpo contends that it has performed all obligations contemplated by the three contracts. The defendant, however, has not paid for the services in full.

Archexpo further contends that on August 10, 1989 the parties signed a protocol where they summed up the balance of their transactions as of August 1, 1989. The defendant promised to transfer to the plaintiff's account in Vnesheconombank $160,000 (US) within a week after the signing of the protocol.

Of the $160,000 owed to the plaintiff according to the August 10th protocol the plaintiff received $110,540, or $49,460 less than the amount owed.

In addition, under the contract signed on August 22, 1989, the plaintiff claimed $169,989 for the services rendered after August 1, as well as $27,879 in late penalties. In the same contract the defendant promised to pay the plaintiff $2,000 a month for operating expenses, or $10,000 total for the duration of the contract from August to December.

According to Archexpo, the defendant failed to pay the plaintiff the difference between the amounts spent by the plaintiff on services to the defendant's groups and the amount spent by the defendant on services to plaintiff's groups, or $17,181.

In addition, the defendant promised to pay the plaintiff for the reception in Aragvi restaurant which cost the plaintiff $1,500.

The total amount of damages claimed by the plaintiff includes:

- $49,460 for the transactions prior to August 1, 1989;
- $169,989 for services provided under the August 22 contract;
- $27,879 in late penalties;
- $17,181 balance of the mutual obligation to pay for the other party's groups;

- $10,000 in operating expenses;
- $1,500 for the Aragvi reception.

Thus, the total amount of the plaintiff's claim is $276,009 (US).

The defendant contends that it transferred $166,838 (US) to the plaintiff's account. The plaintiff denies that it received the payment. The plaintiff repeatedly suggested to the defendant that defendant come to the USSR to resolve the problem and offered to pay for the trip. On November 24, 1989 the plaintiff sent the defendant a detailed breakdown of the claim.

On February 2, 1990 the defendant's representatives were in Moscow to meet the representatives of the plaintiff. During the meeting, the defendant's representatives promised to resolve the financial conflict within one week but failed to do so. On February 16. 1990 the plaintiff

sent the defendant a letter asking for an explanation. The defendant did not respond.

The contracts between the parties provide that if the parties fail to resolve their conflicts, such conflicts shall be resolved by the Arbitration Tribunal of the USSR Chamber of Commerce. On May 14, 1990 Mr. Joe M. Sample, President of the defendant corporation, submitted to the arbiters a short documented response.

On November 12, 1990 the plaintiff wrote a letter to the arbiters amending the amount of its claim to $277,237.

The defendant was represented by the Moscow office of Baker & McKenzie. On November 19, 1990 the defendant filed a lengthy reply with numerous supplements raising a few important legal and factual issues:

In its reply brief the defendant contends that in its complaint the plaintiff named Citizen Ambassador, an organization which is not a legal entity, as the defendant. Because the proper party defendant is International Ambassador Program, Inc., the complaint should be dismissed according to Soviet law and the plaintiff should file an amended complaint.

The defendant's brief states that International Ambassador is one of the world's leading organizations involved in professional travel to foreign countries, including USSR. To provide services to its tour groups International Ambassador works with tour operators abroad.

The defendant contends that at the end of winter 1989 Archexpo approached the defendant and offered to provide the defendant tour operator services in the USSR. The defendant accepted and sent its

first group in May 1989. Before signing a contract, the defendant decided to have a trial period in order to see the plaintiff's ability to deliver services. The trial period showed that the plaintiff could not always deliver the services. For example, the plaintiff failed to provide visa support, accommodation, full performance of the program, etc. This caused dissatisfaction on the part of defendant's clients whom the defendant had to refund $20,290. Because this happened through the fault of the plaintiff the defendant has a claim against the plaintiff. However, because the defendant denies that the parties had an arbitration agreement, the defendant stated that it would file its claim in the District Court for the Eastern District of Washington, not in the Arbitration Tribunal of the USSR Chamber of Commerce.

The defendant believes that as a result of these difficulties it had to send its representatives to Moscow to work with the plaintiff. The defendant repeatedly paid the plaintiff at plaintiff's request sizable amounts in wire transfers and cash, in spite of the fact that there was no written contract and in spite of the fact that the plaintiff's expenses were not substantiated. The defendant considered those sums to be advances for the plaintiff's future services, including operating expenses.

The defendant further states that by September 1989 the relations between the parties deteriorated, mostly because of the plaintiff's unsubstantiated and contradictory requests for payment. On September 14, 1989 the defendant learned from the plaintiff about the contracts which the defendant's employees, Mr. Swanson and

Mr. Chatfield, signed with the plaintiff in Moscow (the Swanson contracts were dated April 28, August 10 and August 22, 1989, and the Chatfield contract, May 15, 1989). The plaintiff's invoices were contradictory, and the defendant asked for substantiation. Under these circumstances, on September 7, 1989, the plaintiff announced that it would stop performing services for the defendant's tour groups. Faced with this threat, the defendant became concerned about its tour groups and wired $60,000 (US) to the plaintiff the same day. On October 3, 1989 the defendant transferred another $40,500 (US) which was done in the spirit of cooperation and trust between the parties. Together with the earlier payment of $59,500 (including $50,500 in cash) the defendant has paid the plaintiff $160,000, or the full sum owed for the period under consid-

eration. However, the payment by the defendant did not represent the defendant's acquiescence to its debt to the plaintiff as of August 1, 1989 because the plaintiff's invoices were not substantiated. On its part, on October 4, 1989 the plaintiff confirmed that it had received $160,000 for the period ending on August 1. In addition, earlier, on July 24, 1989, a representative of the defendant paid the plaintiff $11,700 and later, on October 13, 1989, the same representative transferred to the plaintiff another $10,040.77 for the purchase of a car as part of the total sum owed.

Subsequently, according to the defendant, the plaintiff kept making new unsubstantiated and contradictory demands for payment. On November 24, 1989 the plaintiff alleged that it had received only $110,540 and not the full $160,000

for the period ending on August 1, 1989. The plaintiff also alleged that the defendant owed the plaintiff $202,373 for the next period, including $49,500 balance for the period ending on August 1, 1989. In spite of the lack of substantiation, on November 10, 1989, the defendant made another payment ($20,000 in cash) to the plaintiff via Mr. Scherbakov, although at that time the plaintiff had already stopped performing services. Substantiation of expenses is required by U.S. and Soviet accounting practices. A lack of substantiation may lead to sanctions, including fines, against the violating company. By failing to provide substantiation of expenses, by receiving payments in cash, by receiving money transfers in foreign banks and by engaging in foreign economic transactions without a license the plaintiff violated Soviet law.

The defendant also raises some legal objections. Most importantly, the defendant alleges that the Arbitration Tribunal lacks jurisdiction and that some contracts are void.

The defendant contends that under sec. 1.2 of its Rules the Arbitration Tribunal has no jurisdiction to consider the plaintiff's claim for the payment of $1,500 for the reception in Moscow's Aragvi restaurant because there was no underlying contract or arbitration agreement, only an oral request from Mr. Chatfield, the defendant's director of Soviet programs.

The defendant also argues that the documents signed on April 28 and August 10, 1989 by Mr. Swanson, then a Vice-President, and on May 15, 1989 by Mr. Chatfield, Director of Soviet programs, are void because Mr. Swanson and Mr. Chatfield were not authorized to con-

tract for the defendant. According to RCW 23A.08.478, officers of the corporation "shall have such authority and perform such duties . . . as may be provided by the bylaws, or as may be determined by the board of directors not inconsistent with the bylaws." According to the affidavit of Mr. Sample, President of International Ambassador until June 1990, art. 10, sec. 1 of the defendant's bylaws current in 1989 provided that contracts shall be signed by the president and the secretary unless the board of directors provides otherwise. The defendant did not learn about the mentioned contracts until November 1989. At first Mr. Swanson refused to show the contracts. In the beginning of 1990 the defendant fired Mr. Swanson for his actions. The defendant never led the plaintiff to believe that Mr. Swanson or Mr. Chatfield had any

authority and had never recognized any documents they signed.

The defendant argues that under the law of Washington, the state of incorporation, and Barnes v. Treece, 549 P.2d 1152 (Wn. App. 1976), the said contracts were signed by persons without apparent authority. Therefore, the contracts cannot be considered to have been ratified by the corporation and are not binding on the corporation. Under Soviet law the result is the same: the contracts are not binding because they were not signed by authorized representatives. Art. 48, RSFSR Civil Code. The defendant concedes that the August 22, 1989 contract was binding because, although it was signed by Mr. Swanson, an unauthorized representative, it was later ratified by the defendant.

The defendant contends that because the contracts are invalid, so are the ar-

bitration clauses. This conclusion is supported by works of some prominent Soviet jurists. The fact that the contracts were invalid under the law of Washington state and Soviet law because they were signed by unauthorized representatives means that even if the Arbitration Tribunal were to decide the case, its decision could not be enforced under Art. V(1)(a) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the alternative, even if the arbiters ruled that the contracts were invalid but the arbitration clause was valid, they would have to recognize that they do not have jurisdiction to consider the plaintiff's claims which are related to the period prior to August 1, 1989, and which are based on the August 10, 1989 document. Because the August 10, 1989 contract does not mention arbitration,

those claims can only be covered by the arbitration clause in the April 28, 1989 contract. However, that arbitration clause is drafted narrowly. When parties intend to arbitrate all disputes, including those arising under the contract directly and indirectly, they draft the arbitration clause to say so explicitly. The April 28, 1989 contract mentions only those disputes which arise under the contracts. Under U.S. law, such an arbitration clause does not cover non-contractual claims related, for example, to the actual expenses incurred by the plaintiff outside the scope of a valid contract. Kinoshta & Co., 287 F.2d 951 (1961).

The defendant further contends that the plaintiff, in fact, has failed to prove its claim because it has not presented documentation about each tourist's hotel and other expenses, form of payment, etc.

Under art. 14 of the April 28 contract, the contract shall come into force at the time the plaintiff obtains a foreign trade license. The plaintiff has not presented evidence of such licensing. Prior to obtaining the license the plaintiff could not receive payments especially in foreign currency or engage in foreign trade without violating the Decree of the USSR Council of Ministers (No.7, March 7, 1989). The same objection applies to the August 10, 1989 contract which is silent on the question of whether the amount ($160,000 total) will be owed only with or without the licensing. The plaintiff was supposed to bill the defendant monthly. Because it failed to do so, the plaintiff cannot claim compensation for its services. Art. 6, RSFSR Civil Code. Without documentation, it is unclear why the plaintiff who was demanding to be paid

$160,000, or $120 per person per day for the period ending on August 1, 1989, on August 22 agreed to take $60 per person per day. As regards the August 10, 1989 contract itself, it is invalid.

As regards the plaintiff's claim based on the May 15, 1989 contract, the defendant stresses that sec. 3 of that document provided that the parties shall make a protocol of their expenses incurred in providing services to each other's tour groups every six months, and that the balance shall be paid under a separate agreement. Approximately on October 25, 1989 the plaintiff faxed the defendant a draft protocol according to which from May 15 to October 25, 1989 the defendant spent $4,000 in services to plaintiff's tourists, while the plaintiff spent $11,553 rubles or $18,715 (US) in services to defendant's tourists. In a letter dated

November 24, 1989 the plaintiff asked for the payment of the balance due, or $14,715. However, in the complaint the plaintiff amended the figure to $17,181 without an explanation. The amount requested by the plaintiff is not substantiated by tour group lists, dates, or rates. Possibly, the amount requested relates mainly to the services to defendant's representatives who were sent to Moscow to cure plaintiff's inefficiency. The defendant proposes to return to this issue after the plaintiff presents the necessary documentation. Presently, the defendant considers the claim to be undocumented.

As regards the plaintiff's main claim based on the August 22, 1989 contract, in its November 1990 reply the defendant did not deny liability for plaintiff's legitimate claims but insisted that the plaintiff present documentation.

Sec. 3.12 of the August 22, 1989 contract provided that the plaintiff would bill the defendant within 10 days after the signing of the contract for the period from August 1 until sec. 3.5 of the contract came into force (35 days after the contract is signed). In its response and attached documents the defendant assessed the amount owed the plaintiff for the whole period covered by the August 22, 1989 contract at $109,260, as opposed to $142,110 which is claimed by the plaintiff. According to the defendant, the plaintiff is not entitled to late penalties. Although it is somewhat vague, the August 22, 1989 contract provides for late penalties only for those tour groups which arrived in Moscow after October 26, 1989 (35 days after sec. 3.5 comes into force on September 26, plus 30 days, under sec. 3.12). In fact, all tour groups arrived

before October 26, 1989. In addition, in its complaint the plaintiff claimed the $27,879.12 in late penalties twice. Finally, according to Art. 79 of the RSFSR Civil Code the statute of limitations for the claims for late penalties is six months. The plaintiff's claim is barred by the statute of limitations.

According to the defendant, it has paid more than is owed to the plaintiff. The defendant claims that it has paid the defendant $201,740 plus $52,198 worth of equipment plus $20,240 in refunds paid by defendant to third parties through the fault of the plaintiff. In its brief the defendant stated that if the arbiters agreed with the defendant's estimates, they would have to find that the plaintiff must pay the defendant back the amount of "overcompensation."

The defendant contends that $201,740 includes $110,500 in three wire transfers:

September 2, 1989 transfer of $60,000 to the account of SOVFINTRADE in Vienna; October 3, 1989 transfer of $40,500 to the account of SOVFINTRADE in Vienna; and the October 13, 1989 transfer of $10,000 to the account of AVTOEXPORT-SATRA in Vienna. The plaintiff is not denying that it has received $110,540.

Second, the defendant made six more payments of $19,700 total as per instructions of Mr. Scherbakov, deputy director of Archexpo: $1,000 on March 1, 1989 to Anna Gligstein; 52,000 on May 24, 1989 to Luba Mishev; $2,000 on June 1, 1989 to the account of Vignelli Association; $1,500 on July 12, 1989 to the account of Scharfmann Import Export Warren Art; $2,500 on July 12, 1989 to Alex Livshitz; and $10,700 on August 18, 1989 to the account of the State Planning Committee of Byelorussia for the purchase of a van for

the defendant's tour groups in Moscow. According to the defendant, in the correspondence between the parties the plaintiff confirmed that it had received the said amounts.

Finally, the defendant states that it had paid the plaintiff $71,500 in cash as is confirmed by receipts on Archexpo's letterhead signed by Mr. Scherbakov. The receipts include: receipt for $11,700 from Mr. Swanson on July 14, 1989; receipt for $29,800 from Mr. Swanson on August 10, 1989; receipt for $10,000 from Mr. Chatfield on August 11, 1989; receipt for $20,000 from Mr. Swanson on November 10, 1989.

In its complaint the plaintiff denied the last two payments. With respect to the $10,000 payment the plaintiff says that because it was paid for the freight services provided by a third party, there-

fore, it was not received by the plaintiff. The defendant claims that because the receipt was issued on Archexpo's letterhead and signed by Mr. Scherbakov as Archexpo's deputy director it is irrelevant that the amount may have been eventually received by a third party. The defendant challenges the plaintiff's contention that the plaintiff did not receive the $20,000 and that after October 26, 1989 Mr. Scherbakov was no longer employed by Archexpo. Even if Mr. Scherbakov kept the money, the defendant is deemed to have paid. The plaintiff presented no evidence that Mr. Scherbakov had changed jobs. The plaintiff did not notify the defendant that Mr. Scherbakov had changed jobs. The defendant contends that the court should disregard the plaintiff's argument that on September 22, 1989 the plaintiff in-

formed the defendant by fax that Mr. Khlebin, Archexpo's director, was the only person authorized to sign financial documents. According to the defendant, it is unclear whether Mr. Khlebin could limit the authority of his employees and why his employees, even though they could not bind the company financially, could not receive payments on behalf of the company and issue receipts. The defendant believes that there was another reason for this. Under Soviet law the plaintiff could not legally receive cash. The plaintiff's employees who received cash would be subject to criminal and civil liability. However, even if this was the case, the defendant is still deemed to have performed.

The defendant also contends that the cost of the equipment provided by the defendant for the office which was used by

the plaintiff's and defendant's employees after October 22, 1989 and retained by the plaintiff should be counted as part payment of the amount due. The equipment is worth $52,189,08. It is owned by the defendant who never intended to turn it over to the plaintiff without consideration. The September 30, 1989 contract signed by Mr. Chatfield and referred to by the plaintiff simply contemplated that the plaintiff could become the owner of the office equipment if the plaintiff agreed to pay for it or accept it as partial payment for the plaintiff's services.

Finally, the defendant contends that it sustained damages due to the plaintiff's failure to provide adequate services to some of the defendant's tour groups. The defendant had to refund its clients $20,240. The defendant contends that the plaintiff must compensate the

defendant $20,240. Alternatively, this amount must be counted to mitigate damages.

The parties did not object to the composition of the arbitration panel which conducted the proceeding on November 21-22, 1990.

During the arbitration each party further developed its position and presented some additional evidence.

In particular, the plaintiff offered an affidavit signed by Mr. Scherbakov and dated July 25, 1990. In the affidavit Mr. Scherbakov denied that he had received cash from the defendant. The plaintiff also stated that if the arbiters hold that this amount, in whole or in part, was paid by the defendant, the plaintiff would proceed against Mr. Scherbakov.

Mr. Scherbakov testified at the hearing as a witness. He conceded that he signed the receipt to Mr. Chatfield. He

testified, however, that he routinely signed plaintiff's blank letterhead for the defendant's use in the regular course of business. He denied that by signing blank sheets he intended for them to be used as receipts for cash payments by the defendant.

As regards the payments which, according to the defendant, the defendant made to third parties at Mr. Scherbakov's request, the plaintiff contends that no payment made before the first contract was signed on April 28, 1989, can be taken into account in the computation of damages. The result is the same whether the payment was made at the request of Mr. Scherbakov as a private party or contrary to the plaintiff's warning to the defendant against making payments.

The defendant, in turn, contends that all payments it made must be taken into account in the computation of damages.

At the end of the arbitration proceeding the arbiters decided to send the parties the arbiters' opinion but not to announce the arbiters' decision at the proceeding itself. Art. 38, sec. 2, Arbitration Tribunal Rules. Due to the arbiters' planned trips out of Moscow, the Chairman of the Arbitration Tribunal granted their request to extend the deadline for the opinion until March 15, 1992. Art. 38, sec. 4, Arbitration Tribunal Rules.

OPINION

Having heard the facts of the case and the parties' theories in their decision the arbiters were guided by the following reasoning:

1. The arbiters first considered the defendant's contention that the plaintiff has failed to name the proper party as the defendant. The complaint in the

Arbitration Tribunal named as a defendant Citizen Ambassador which is not an independent legal entity. The proper party defendant is International Ambassador Program, Inc., a Washington corporation. The defendant's attorney contended that the complaint should be dismissed for failure to name the proper party as the defendant.

In their turn, the plaintiff's representatives contended that in their complaint the plaintiff used the same short name for the defendant's company which was used in their business transactions, contracts, and correspondence. Importantly, the proper party defendant corporation itself used the same name.

Under art. 15 of the Rules of the Arbitration Tribunal a complaint must include the names and addresses of the parties. In the present case, the plaintiff's complaint filed with the Arbitration Tri-

bunal on March 19, 1990 named as the defendant Citizen Ambassador and stated its full address as Dwight Eisenhower Building, Spokane, WA, 99292, USA. The contracts which are involved in the dispute and which are attached to the complaint also state that the U.S. party is Citizen Ambassador located at the same address. The same name is used in both the English and Russian versions of the August 22, 1989 contract which the defendant ratified and which it is not contesting. The president of the defendant company, Mr. Sample, in his affidavit to the Arbitration dated May 14, 1990 did not raise an objection to the name used in the complaint. Finally, the power of attorney authorizing the defendant's lawyer, Mr. George, to represent the defendant in the present proceeding and dated July 6, 1990, was issued by Mr. Sample on behalf

of Citizen Ambassador Program, Spokane. Other documents, such as letters, written by the defendant also referred to the defendant as Citizen Ambassador, a division of International Ambassador Program, Inc.

In view of these facts the arbiters hold that the plaintiff's complaint sufficiently identifies the defendant. Because the short name is sufficiently clear and because there is no danger of confusion using the short name is not grounds for dismissal. The meaning of Art. 15 of the Arbitration Tribunal Rules and its application creates no obstacle to changing the name of the legal entity from the short name to the full legal name during the arbitration proceeding. Thus, based on the evidence presented in the case and the defendant attorney's explanation, the proper party defendant is International Ambassador Program, Inc. which conducted

some business as Citizen Ambassador Program.

2. The arbiters then considered the issue of their jurisdiction over the present dispute. The defendant contended that the arbiters had no jurisdiction over the dispute because the underlying contracts were invalid and, thus, the arbitration clauses were also invalid. The arbitration clause is part of the August 22, 1989 contract (sec. 3.10) which the defendant ratified and of other contracts which are the subject of the complaint and which the defendant is contesting (sec. 17 of the April 28, 1989 contract, and sec. 17 of the May 15, 1989 contract). The arbitration clause in the April 28, 1989 contract also applies to the August 10, 1989 protocol which is part of the April 28 contract. All arbitration clauses provide that the disputes

between the parties shall be resolved by the Arbitration Tribunal of the USSR Chamber of Commerce whose decisions shall be recognized by the parties as final.

Under art. 1, sec. 4 of the Rules of the Arbitration Tribunal, jurisdictional issues are resolved by the same arbiters who are hearing the dispute.

2.1. As regards the choice of law governing the arbitration, the arbiters hold that the Soviet law controls. The Arbitration Tribunal of the USSR Chamber of Commerce is a permanent arbitration body established by a special act of the legislature. 50 Vedomosty Verkhovnovo Soveta SSSR, item 806 (1987). The fact that the parties chose to arbitrate their dispute in that body indicates that they also intended that their contracts be governed by Soviet law. Even if the parties' contracts were not to be interpreted to

indicate their intent that the Soviet law controls, in the absence of contrary provisions under conflicts of law doctrine the Soviet law controls. This approach to conflict of laws is well established in the Soviet court and arbitration practices and is supported by conflicts of law provisions of international treaties signed by the USSR. See, e.g., The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 46 Vedomosty Verkhovnovo Soveta SSSR, item 421 (1960). Article V(1)(a) of the New York Convention provides that in those cases when an arbitration clause is invalid the law of the state chosen by the parties controls. In other cases the law of the state where the arbitration decision was made controls. The latter provision suggests that the same rule applies to the determination of the validity of

the arbitration agreement in the course of the arbitration proceedings.

2.2. Under Soviet law, even in those cases when an arbitration clause is included in the main contract it is a separate and divisible agreement independent of the main contract. Under this doctrine, even if the contract itself was invalid, this would not necessarily mean that the arbitration clause contained in the contract is invalid. The validity of the arbitration clause is a separate issue. Contrary to the defendant's contention, this approach is firmly established in Soviet jurisprudence and works by Soviet jurists. Under this approach, because the arbitration clause is valid, the arbiters have jurisdiction to consider the consequences of declaring the main contract invalid.

It follows, then, that even if the arbiters were to accept the defendant's

contention that the April 28 and May 15, 1989 contracts are invalid, because the arbitration clauses are valid independently of the main contract, the arbiters would still, as they do, have to hold for the plaintiff based on the actual detriment sustained by the plaintiff and benefits derived by the defendant. The arbiters, however, disagree with the defendant's contention that the contracts were invalid.

2.3. At the same time the arbiters agree with the defendant that the scope of the arbitration agreement, or the range of issues which are arbitrable under this agreement, is another issue. The scope of the arbitration agreement is a separate issue whether the arbitration agreement is viewed as valid separately or not. However, the arbiters disagree with the defendant's contention that the

arbitration clauses are limited in scope and apply only to disputes arising under valid contracts, as opposed to any disputes arising in connection with the contracts. Notwithstanding the defendant's objection to the enforcement of the present decision in the United States under the New York Convention, the arbiters stress that the interpretation of the arbitration agreement is controlled by Soviet law. Under Soviet law it is well settled that an arbitration clause which is contained in the main contract and which does not explicitly limit the scope of arbitration (for example, only to disputes about quality or quantity, etc.) applies to all disputes between the parties, including disputes about the validity and the consequences of the invalidity of the main contract. In the present case none of the arbitration clauses are phrased

narrowly. Section 17 of the April 28, 1989 contract provides for an amicable resolution of "all possible disputes and differences arising out or in relation to this Agreement" and, if no agreement is reached, that "all disputes and differences" be referred to the Arbitration Tribunal. Section 4 of the May 15, 1989 contract provides that parties shall use their best efforts to negotiate "all possible disputes" and that the unresolved disputes shall be referred to the Arbitration Tribunal. Section 3.10 of the August 22, 1989 contract provides that the parties shall negotiate "disputes and differences arising from or in connection with their Agreement" and that, if they fail, "all disputes and differences" shall be referred to the Arbitration Tribunal. Clearly, all three arbitration clauses cover all disputes which are the involved in the present case.

Incidentally, the U.S. law referred to by the defendant recognizes that unless provided otherwise, parties to an arbitration agreement are presumed to intend to arbitrate all disputes. U.S. law also recognizes that there is no single formula for a broad arbitration agreement; that the "arising under the contract" language is descriptive, not limiting; that only an express limiting language makes an arbitration clause narrow; and that in 1983 the U.S. Supreme Court, expressing a general trend, held that all doubts as to arbitrability should be resolved in favor of arbitration. See generally J. McClendon and Goodman, International Arbitration in New York, 31, 51-52 (1986).

In addition, in the present case the contracts were drafted in English and in Russian and both texts used broad language in the arbitration clauses, includ-

ing the language "disputes . . . in connection with the agreement" (section 3.10, August 22, 1989 contract, the English version dated August 31, 1989).

2.4. In challenging the validity of the contracts and arbitration clauses, the defendant contends that under the law of Washington state, where International Ambassador is incorporated, they were signed by unauthorized representatives. The April 28, 1989 contract, the August 10, 1989 protocol and the August 22/31, 1989 contract were signed by Mr. Swanson, Vice-President of International Ambassador. The May 15, 1989 contract was signed by Mr. Chatfield, Director of Soviet programs of the defendant corporation.

The issue is which law controls the authority of a legal entity, who may bind a legal entity in its relations to third

parties, and the scope of authority of its organs and employees. Under Soviet conflict of law principles, the authority of foreign companies in foreign economic transactions is controlled by the law of the state of incorporation or formation. Art. 124, USSR Civil Code (1961), Art. 564, RSFSR Civil Code (1964). Art. V(1)(a) of the New York Convention provides that the validity of the arbitration agreements is controlled by the law of the state chosen by the parties or the law of the state where the decision was or will be made. However, the New York Convention makes a separate reference to the law which controls the authority of the parties. Although the arbitration agreement is not a foreign economic transaction but, rather, a separate type of legal agreement, it is logical, by analogy with Art. 124 of the USSR Civil Code and Art. 564 of the RSFSR

Civil Code, to assume that the authority of a foreign legal entity to sign an arbitration agreement is also controlled by the law of the state where the entity was formed or incorporated. Thus, the issue of the defendant's authority to sign an arbitration agreement is controlled by the law of Washington state. The arbiters point out, however, the difficulty of interpreting and applying the law of a foreign state.

2.5. Based on the U.S. authority available to the arbiters they conclude that under the U.S. corporate law and the corporate law of individual states a corporation's daily business is conducted by corporate officers (president, vice-president, secretary, etc.). This provision is stated in the articles of incorporation and third parties dealing with the corporation are presumed to be

aware of it. These employees are considered to be agents of the corporation and their authority in dealing with third parties is controlled by the law of agency. Unlike the president of the corporation who is presumed to have authority to act on behalf of the corporation in any aspect of its business, the authority of other employees is limited by the scope of their employment. At the same time, their authority can be expanded by the corporation's conduct, in particular, under the general principles of apparent authority. In addition, a corporation may ratify an invalid act by its agent. See, e.g., R. Anderson, I. Fox, D. Twomey, Business Law 870 (1987). There is authority that an agent acting with apparent authority can bind the principal with regard to an arbitration agreement; even if the agent was acting outside the scope of his au-

thority a subsequent ratification by the principal makes the arbitration agreement valid. See Domke on Commercial Arbitration.

2.6. The arbiters believe that the defendant failed to prove that Mr. Swanson, Vice-President, and Mr. Chatfield, Director of Soviet programs of the defendant corporation, were not authorized to sign the contracts in question. Even if the arbiters were to agree with the defendant that the issue of authority is controlled by the defendant's articles of incorporation current in 1989, it still does not follow that the said contracts could not be signed by any other employee except Mr. Sample. (Incidentally, Mr. Sample's November 13, 1990 affidavit states that those articles do not reflect that the previous name of the corporation, High School Student Ambassador

Program, Inc., was changed to the present name International Ambassador Program, Inc.) Art. 10.1 states that the board of directors could specify a different procedure depending on particular circumstances. Both Mr. Swanson and Mr. Chatfield worked with the plaintiff on behalf of the defendant as employees who acted within the scope of the services which were rendered by the plaintiff to the defendant for several months. They were not working with the plaintiff as defendant's support personnel. Mr. Swanson and Mr. Chatfield were performing their functions for the benefit of the defendant. The defendant charged them with working with the plaintiff, paid for their extended stay in Moscow, and knew that they were working with the plaintiff on a permanent basis in a shared office. Not once did the defendant inform

the plaintiff that its employees had limited authority. Acting on defendant's behalf, Mr. Swanson and Mr. Chatfield conducted business which required written contracts. Their business with the plaintiff was in the nature of extended commercial relationship rather than a one-time isolated deal. Their responsibilities included making payments for services to defendants' tour groups arriving in Moscow. Given these facts, the arbiters hold that the defendant failed to rebut the presumption that Mr. Swanson and Mr. Chatfield were actually authorized, directly or indirectly, to contract on behalf of the defendant.

2.7. However, even if Mr. Swanson and Mr. Chatfield were not authorized to contract for the defendant, the arbiters would still have to find that the plaintiff had enough reasons to think that Mr. Swanson and Mr. Chatfield had appar-

ent authority. It followed from the defendant's acts that Mr. Swanson's and Mr. Chatfield's acts were binding on the defendant. The defendant charged them to conduct business with the plaintiff over a long period of time without any explicit limitations. Thus, the plaintiff believed that it was not necessary to ask further questions concerning their authority. An examination of the correspondence between the parties confirms that each party understood Mr. Swanson's and Mr. Chatfield's status and function to be fully authorized representatives of the defendant in the plaintiff's state. The defendant did not put at issue their authority to contract for the defendant until Mr. Sample's affidavit dated November 13, 1990, at the very end of the arbitration proceeding.

2.8. Alternatively, even if the ex officio and apparent authority ar-

guments were rejected, the arbiters believe that the defendant explicitly or implicitly ratified the acts of its representatives in Moscow. The defendant failed to mention any limitations on Mr. Swanson's and Mr. Chatfield's authority during the defendant's course of dealings with the plaintiff. The defendant failed to object to the contracts signed by them. Even if, as it states, the defendant did not find out about the contracts until getting the plaintiff's letters on September 14 and 19, the defendant failed to object to them immediately or within a reasonable time. In the course of the arbitration proceeding the defendant stated that it had directly ratified only one of the contracts, the August 22/31, 1989 contract. However, the defendant never informed the plaintiff about the ratification or about the re-

fusal to ratify the other contracts (April 28, August 10, and May 25, 1989) if the defendant did indeed refuse to ratify them. On the contrary, the defendant reacted to the contracts positively and made statements indicating that it agreed with the said contracts. Specifically, on September 27, 1989 the defendant transferred $60,000 and, on October 3, 1989, $40,500, to the plaintiff's account. The correspondence between the parties indicates that these amounts were paid as compensation for services provided under the contracts. The correspondence does not, however, contain any objections to the contracts themselves. Moreover, in the reply to the complaint filed with the Arbitration Tribunal on May 14, 1990, the defendant not only failed to object to the validity of the contracts, but, on the contrary, referred to them directly by

claiming that the plaintiff failed to deliver services under the contracts and improperly used the payments received under the contracts.

2.9. The arbiters' conclusions are consistent with the opinion of the Washington Court of Appeals in Barnes v. Treece, 549 P.2d 1152 (1976) which the defendant relies on.

In that case the court held that the issues of apparent authority and implied ratification by a corporation of an invalid contract were questions of fact which turned on the circumstances of the case. According to part 14 of that decision, a corporation impliedly ratifies a contract signed by an unauthorized representative when the corporate principal knows about the facts and (1) benefits from the contract; (2) fails to contest it immediately; and (3) otherwise mani-

fests that the contract is binding on the corporation. Although not met in Barnes v. Treece, this test is met in the present case. The defendant was informed about Mr. Swanson's and Mr. Chatfield's activity in Moscow, as well as about the transactions involved in providing services to defendant's tour groups. Over a long period of time the defendant enjoyed all the benefits flowing from the services rendered under the contracts signed on its behalf. By challenging the validity of the contracts at the last stage of the arbitration proceedings and by refusing to pay the defendant caused the plaintiff to sustain harm. As regards the other two parts of the test, there is ample evidence that the defendant failed to contest the validity of the treaties until the last state of arbitration and manifested to the plaintiff that the defendant considered

the contracts binding. Under these facts, all contracts, even if signed by officials without ex officio or apparent authority, must be considered to have been impliedly ratified by the defendant corporation. Thus, the defendant corporation is estopped from denying ratification.

2.10. Thus, the arbiters hold that under the law of the state of incorporation which controls the issues of authority the contracts in question are valid.

The same conclusion applies to the arbitration clauses contained in the contracts which provided that all disputes between the parties shall be referred to the Arbitration Tribunal of the USSR Chamber of Commerce. Although the arbitration agreements are independent of the main contracts, the arbiters believe that

under the applicable law the issue of the validity of the arbitration agreement is resolved the same way as the issue of the validity of the contracts. Specifically, those representatives who can sign a contract binding the corporation can also sign a binding arbitration agreement. The issue of their authority and consequences that follow is governed by the same general principles in both cases. The defendant has not made any specific objections to the arbitration clauses which are distinct from its objections to the validity of the main contracts. On the contrary, it was the defendant's position that the invalidity of the main contracts led to the invalidity of the arbitration clauses. Then, if the main contract was valid, so is the arbitration clause. In holding that the said contracts and arbitration clauses are valid, the arbiters emphasize

that in the defendant's first reply to the plaintiff's complaint on May 14, 1990, the defendant not only failed to object to the arbiters' jurisdiction but argued about the substance of the claim and raised its own counterclaim for damages (i.e., the refunds) caused by the plaintiff's alleged failure to deliver contractual services.

2.11. In sum, the arbiters hold that all the contracts are valid and binding on the parties. Unlike the issue of authority which is controlled by the law of each party's state, other contractual rights and obligations of the parties are governed by Soviet law. Under art. 126 of the USSR Civil Code and art. 566 of the RSFSR Civil Code, the rights and responsibilities of parties to a foreign economic transaction are controlled by the law of the state where the contract was made, unless the contract

provides otherwise. All the contracts at issue were signed in Moscow. In addition, in their briefs both parties referred to principles of Soviet law. Thus, they agreed to the application of Soviet law.

The arbiters find that, because the parties' agreement on referring their disputes to arbitration is legal and binding, the arbiters have jurisdiction over the issue of the validity of the contracts. As regards the validity of contracts, the issues of authority are controlled by the law of each state, while the rest of the issues are controlled by Soviet law. Thus, there are no obstacles to the arbiters' jurisdiction over all issues involved in the present case which are connected to these contracts.

3. The arbiters then turned to the substantive issues raised in the complaint.

3.1. The arbiters find that the plaintiff's claim with respect to expenses incurred in rendering services to the defendant's tour groups from May to July 1989 is supported by the August 10, 1989 protocol signed by Mr. Khlebin and Mr. Scherbakov for the Soviet side and by Mr. Swanson for the U.S. side. According to this protocol the said expenses including accommodation, meals and services to the defendant tour groups and the plaintiff's operating expenses amounted to 117,725 rubles. The protocol stated that under the April 28, 1989 contract the American party was to transfer the dollar equivalent, or $189,880, to the Soviet party's account in Vnesheconombank. However, the $189,880 figure printed in the protocol was crossed out and $160,000 was handwritten over it. The evidence presented in the case suggests that the dif-

ference, $29,880, was paid in cash to Mr. Scherbakov as is evidenced by the receipt issued by him the same day, August 10, 1989. However, the protocol itself is silent about this fact. Whatever the reasons for the amended amount, in the absence of other evidence on the issue the arbiters believe that under the April 28, 1989 contract the plaintiff can claim only $160,000 for the period from May to July.

The arbiters find unconvincing the defendant's argument that the August 10, 1989 protocol to the April 28, 1989 contract is invalid because it was signed by unauthorized representatives. See discussion above.

The August 10, 1989 protocol is binding on the parties. Therefore, the defendant's request for further documentation of the amount mentioned in the protocol is

not justified. Although article 3 of the April 28, 1989 contract provides that the American party shall pay the Soviet party's expenses within a month of the billing, in the present case the parties agreed, alternatively, to negotiate the expenses and reflected the negotiated amount in the protocol.

The arbiters do not agree with the defendant's contention that the plaintiff is not entitled to payment under the April 28, 1989 contract because in May-July 1989 the plaintiff was not licensed to engage in foreign economic transactions. Under article 14 of the contract, it comes into force when the licensing is obtained. The arbiters find that the defendant's obligation to pay for plaintiff's services under the April 28, 1989 contract would arise even if the plaintiff obtained the license and, therefore,

if the contract came into force, later than the stated date. In the latter case, the contractual obligation would arise as soon as the condition mentioned in article 14 was satisfied. The evidence offered in the case supports the conclusion that the plaintiff obtained the license in May 1989. In an affidavit written on November 26, 1990 by INFORM VES, an information agency of the USSR Ministry of Foreign Economic Relations which issues foreign trade licenses confirmed that it issued the plaintiff license No. IN-1145/098 on May 6, 1989. Attached to the affidavit is a copy of the plaintiff's license. It is irrelevant that the plaintiff later amended its foreign trade license with the Ministry, specifically on scope of the plaintiff's activity. The arbiters hold that the condition mentioned in art. 14 of the April 28, 1989 contract was

met and that the contract came into force. Contrary to the defendant's contention, the scope of the plaintiff's foreign transactions initially included transactions covered by the contracts between the parties. In light of the current legislative policy to encourage and stimulate foreign trade, Archexpo's license which mentioned "professional tourist services" authorized it to receive not only groups of architects but also other groups sent by defendant under the contracts.

Thus, the arbiters hold that the defendant must pay the plaintiff the amount due under the April 28, 1989 contract, or $160,000 stipulated by the parties in the August 10, 1989 protocol.

3.2. On the issue of payments under the contract signed in August and dated August 22, 1989 in Russian and August 31, 1989 in English the arbiters were guided by the following rationale.

The said contract contemplated that the parties would cooperate in bringing groups of science and business professionals to Moscow. The groups would be organized by Citizen Ambassador, the U.S. party, who would pay Archexpo, the Soviet party, $60 (US) per person per day to provide accommodation, meals, transportation and to organize professional activities for those groups. Art. 3.2 of the contract.

Under Art. 3.5 of the contract, the U.S. party was to pay the Soviet party $60 per person per day no later than 30 days after the group's arrival in the USSR. The U.S. party was to pay late penalties of 0.1% of the total for each day after the deadline. In addition, under art. 3.9 of the contract the U.S. party was to pay the Soviet party $2,000 in operating expenses "by transferring such sum on the

first day of each month to the account of the Soviet party."

Under art. 3.11, art. 3.5 came into force 35 days after the contract was signed. Art. 3.12 of the contract provided that the "present agreement is in force from August 1 until December 31, 1989 inclusively. Payment for the expenses incurred by the Soviet party from August 1 before Art. 3.5 of the present agreement becomes valid, shall be effected in 10 days from signing."

3.3. The plaintiff testified that under the said contract it received 13 tour groups in the summer and fall of 1989. The groups were led by De Alessi (34 people, arriving on August 8, staying 6 days, total payment $12,240); Bruce (50 people, August 29, 5 days, $15,000); Chandler (32 people, August 26, 4 days, $7,680); Hilbert (55 people, September 9,

9 days, $24.750); Levine (18 people, September 16, 7 days, $7,560); Smith (32 people, September 24, 5 days, $9,600); Travisono (23 people, September 28, 4 days, $5,520); Meyer (37 people, October 8, 3 days, $6,660); Jensen (58 people, October 9, 6 days, S20.880); Kost (25 people, October 10, 5 days, $7,500); Mercer (33 people, October 19, 6 days, $11,880); Wealer (25 people, October 19, 4 days, $6,000); and Knox (19 people, September 7, 6 days, $6,840). Thus, the plaintiff estimated the total amount owed as $142,110 at the rate of $60 (US) per person per day. The arbiters find that the plaintiff correctly assessed damages at the rate of $60 per person. The $60 rate applies to all mentioned tour groups because all of them arrived after August 1, 1989. In spite of the fact that the contract was signed at the end of Au-

gust, under art. 3.12 it came into force on August 1, 1989. The $60 rate applies notwithstanding art. 3.11 which provides that art. 3.5 comes into force 35 days after the signing of the contract. Art. 3.5 refers to the late penalty, not the rate. Although mentioned in art. 3.5, the rate applies through art. 3.2 which, like other articles of the contract, came into force on August 1, 1989.

In the reply brief the defendant submitted its own computations of expenses for each of the tour groups, including lists of participants, length of stay in Moscow, and total amounts, also at the $60 rate. According to the defendant's computations, the total amount owed the plaintiff was $109,260, not $142,110. The defendant's computations included groups led by Griffin (a group not mentioned by the plaintiff) (1 day, 24 people, $1,410);

De Alessi (August 8, 5 days, 29 people, $8,700); Bruce (August 24, 4 days, 43 people, $10,320); Chandler (August 26, 4 days, 33 people, $3,960 - the group paid the difference to the hotel independently); Hilbert (September 9, 4 days, 51 people, $12,240); Levine (September 16, 4 days, 16 people, $3,840); Smith (September 24, 4 days, 32 people, $7,680); Travisono (September 28, 4 days, 22 people, $5,230); Meyer (October 8, 4 days, 35 people, $8,400); Jensen (October 9, 5 days, 57 people, $17,100); Kost (October 10 5 days, 25 people, $7,500); Mercer (October 14, 5 days, 33 people, $9,900); Wealer (October 19, 5 days, 25 people, $7,500); and Knox (September 7, 5 days, 18 people, $5,400).

The defendant's computations are based on the lists of tour groups leaving the U.S. and on the then planned length of

stay in Moscow. The plaintiff failed to put forward any evidence challenging the defendant's evidence. Thus, the arbiters hold that the plaintiff is entitled to damages in the amount of $109,260 as estimated by the defendant.

3.4. In addition to the payment for services to the defendant's tour groups, the plaintiff is also claiming late penalties in the amount of 0.1% of the total amount due per day. Initially, the plaintiff counted the penalty twice: first by adding it to the payment for services ($142,110 + $27,879 = $169,989) and then as a separate item of damages, $27,879. The defendant objected and on November 12, 1990 the plaintiff amended its claim. The plaintiff reduced the claim for damages for services rendered to $142,110 and listed the penalty as a separate item, amending the amount in the

complaint. In the complaint the plaintiff computed the penalty over the period starting a month before the group's arrival in Moscow and ending on March 1, 1990. For example, with respect to the De Alessi group of 34 people arriving in Moscow on August 8, 1989 and staying 6 days ($12,240 total), the plaintiff computed the late penalties over the period from July 8, 1989 to March 1, 1990, or 236 days, or $2,888.64. The late penalties for other groups were computed in a similar way. The total late penalties were assessed at $27,879. On November 12, 1990, in a letter to the arbiters the plaintiff recalculated the penalty differently, over the period from September 26, 1989 to November 1, 1990, the total of 401 days, at $56,986.11.

Thus, the plaintiff contended that the late penalties accrued regardless of

each group's arrival in Moscow and must be computed as of September 26, 1989, or 35 days after the signing of the contract on August 22, 1989. The defendant contended that under art. 3.11, art. 3.5 of the contract applies only to those groups which arrived in Moscow 30 days or more after this article came into force, or 65 days or more after the signing of the contract. According to the defendant, otherwise the defendant would be unable to meet its prepayment obligations under art. 3.5. Because practically all groups arrived before that date, no late penalty is due.

Admittedly, art. 3.11 is ambiguous on when art. 3.5 comes into force. It should be interpreted in light of the totality of contractual provisions and the intent of the parties which can be inferred from them. The parties agreed that the defendant's obligation to transfer

payment for each tour group no later than 30 days after the group's arrival would come into force 35 days after the signing of the contract. The only reasonable interpretation of this provisions is that the parties intended to give the defendant the 30 days necessary to pay for each delegation arriving in Moscow after the signing of the contract. Therefore, the plaintiff is not entitled to late penalties for the groups arriving between August 1, 1989, when the contract came into force (art. 3.12), and 35 days after the signing of the contract. On the other hand, the defendant's argument that the obligation to pay applied only to groups arriving 30 days after the 35-day period following the signing of the contract is not convincing. If the parties had intended that art. 3.5 would come into force 65 days later, they would have said so explicitly.

In sum, the defendant must pay the plaintiff late penalties for those groups which arrived in Moscow 35 days after the signing of the contract and for which the defendant could have made payments 30 days in advance.

Because the Russian text of the contract is dated August 22, and the English text, August 31, 1989, and both texts are signed by both parties, in the absence of other evidence the arbiters hold that the date of the contract is August 31, 1989.

Therefore, the plaintiff is entitled to late penalties for the following groups: Meyer (October 8, 1989, $8,400); Jensen (October 9, $17,100); Kost (October 10, $7,500); Mercer (October 14, $9,900); and Wealer (October 19, $7,500). The plaintiff is entitled to 0.1% of the total compensation for each day past 30 days preceding the group's arrival. The

plaintiff, however, claimed penalties for all groups, including the ones above, arriving after September 26, 1989, over 401 days ending November 1, 1990. Because the arbiters cannot go beyond the formula of assessing damages which was chosen by the plaintiff, they hold that the defendant must pay the plaintiff 0.1% in late penalties which accrued on $50,400 due for the said groups over the period of 401 days, or $20,210 (US).

3.5. The arbiters disagree with the defendant's contention that the complaint is barred by the statute of limitations. The Soviet law establishes a general 3-year statute of limitations for civil suits. However, in claims for late penalties a shorter, 6-month statute of limitations applies. Art. 16, USSR Civil Code; Decree of the Presidium of the USSR Supreme Soviet, July 8, 1974 (29 Vedomosty

Verkhovnovo Soveta, item 428, (1974)); Art. 78-79 RSFSR Civil Code (1964). The statute of limitations starts running when the injured party knew or should have known that the injury occurred. However, in certain types of business relations between parties, including continuous relations, this rule should not be interpreted to mean that the statute runs out six months after the party first learned or should have learned about the violation. In particular, when the complaint involves continuous monetary sanctions against a debtor, such as late penalties under a contract, the plaintiff's right to sanctions, and, therefore, the statute of limitations, accrue daily. Therefore, the total late penalties accrue over the whole period until the payment of the contract price is made and the complaint for late penalties can be filed within 6 months of

that payment. See, e.g., Commentary to the RSFSR Civil Code, at 108, (1982). In the present case, as of the date the plaintiff filed its complaint with the arbitration, the defendant had not paid the contract price. Thus, the 6-month statute of limitations is satisfied. In addition, because the statute of limitations was suspended when the complaint was filed on March 19, 1990, the plaintiff can amend its complaint in the course of the arbitration proceeding.

3.6. On the issue of operating expenses incurred by the plaintiff in providing services to defendant's tour groups, the arbiters find that the plaintiff is entitled to operating expenses for four months, from August to November 1989, or $8,000 (US) (Art. 3.9 of the August 22/31, 1989 contract provided that $2,000 a month in operating expenses was payable

on the first day of each month to the Soviet party's account). Although the plaintiff claimed 5 months in operating expenses, or $10,000, the arbiters disagree that the plaintiff is entitled to $2,000 in operating expenses for December 1989. Evidence shows that no groups were scheduled to arrive in December, therefore the plaintiff incurred no operating expenses in providing service to defendant's tour groups that month.

3.7. On the issue of compensation for the reception in Moscow's Aragvi restaurant, the arbiters find that the plaintiff organized the reception at the defendant's request and for defendant's benefit. This is directly supported by Mr. Chatfield's letter dated October 18, 1989. The fact that the defendant did not agree to pay for the reception until after it was over does not

diminish the defendant's general contractual obligation to the plaintiff. See, e.g., August 22/31, 1989, contract which provided that the American party shall pay the Soviet party for any additional expenses the latter party might incur. The plaintiff's claim is documented by a check from the restaurant (check No. 323 for 1,500 rubles dated October 6, 1989). The plaintiff forwarded the check to the defendant on October 25, 1989 and asked for the payment of $2,200, at the then current official exchange rate. In the complaint the plaintiff amended the amount to $1,500. The arbiters hold that the latter amount is the correct amount owed.

3.8. Turning to the plaintiff's claim for expenses incurred in paying for the stay of defendant's representatives in Moscow, the arbiters find that the May 15, 1989 contract pro-

vides that the parties would compensate each other for such expenses. The balance was to be determined every six months and payments were to be made on the basis of a separate protocol. The protocol drafted by the plaintiff and sent to the defendant stated that between May 15 and October 25, 1989 the defendant had spent $4,000, and the plaintiff, 11,553 rubles, or $18,715 (US). Under the protocol the balance was $14,715. However, in the complaint the plaintiff claimed $17,181 (US) without an explanation.

Although the defendant did not sign the protocol, the defendant did not deny its obligation to pay for such expenses, insisting, however, that the plaintiff present hotel and other bills, dates of the trips to Moscow by the defendant's representatives, etc. The arbiters hold that the burden of presenting documenta-

tion on this issue is on the plaintiff. Because the plaintiff has failed to present evidence of its expenses to the arbitration the plaintiff's request for damages cannot be granted.

At the same time, the arbiters point out that in the course of the arbitration proceedings, in asking the arbiters to deny the plaintiff's request as undocumented, the defendant also offered to return to the issue when and if Archexpo provided the necessary documentation.

3.9. Given the reasons stated above, the arbiters hold that the defendant must pay the plaintiff damages in the amount of $298,970 ($160,000 + $109,260 + $20,210 + $8,000 + $1,000).

4. The arbiters stress that the parties treated their payment procedures rather casually. A lack of documentation, as well as vague and even contradic-

tory statements by the parties make factual determinations in the present case difficult.

4.1. The evidence presented shows and the plaintiff has in fact conceded in its complaint that the defendant has paid the plaintiff $110,540. This amount was paid in three bank transfers: $60,000 transferred on September 27, 1989; $40,500 transferred on October 3, 1989; and $10,065 transferred on October 13, 1989. The first two transfers were made to the account of Sovfintrade in Vienna and were marked "for the services of Archexpo"; the third transfer was made to the account of "Avtoexport" in Vienna and was marked "Archexpo, payment for tour groups." The third payment was meant for the purchase of a Mercedes automobile which, according to the September 30, 1989 contract, was to be used in Moscow by the

defendant until February 1990 and was then to become property of the plaintiff.

4.2. The defendant contends that it made 6 more money transfers to the plaintiff for the total amount of $19,700. The arbiters find that only $8,000 can be deemed to have been made in payment for the defendant's contractual obligations: $2,000 to Luba Mishev on May 24, 1989; $2,000 to Vignelli International on June 1, 1989; $1,500 to Scharfmann Import Export on July 13, 1989; and $2,500 to Alex Livshitz on July 12, 1989. In addition, in his testimony Mr. Scherbakov, deputy director of Archexpo, in fact conceded that those payments were made.

As regards another one of the six payments, a $1,000 payment to Anna Gligstein made at Mr. Scherbakov's oral request on March 1, 1989, the plaintiff denies that the payment is related to the

contract between the parties which was signed on April 28, 1989. The arbiters agree. The defendant has failed to present evidence corroborating the parties' agreement that the said payment was part of the defendant's contractual obligations.

Finally, with respect to the last one of the six payments, the defendant offered a copy of the bank transfer of $10,700 from the defendant's account in Washington Trust Bank, Spokane, to the State Planning Committee of Byelorussia for the purchase of a van. The evidence n the case also contains a written request (No. 509-5345245) for the transfer of $10,700 to the Byelorussian State Planning Committee for the purchase of a van. The request is written on the letterhead of Citizen Ambassador and signed by Mr. Scherbakov. Mr. Scherbakov signed the letter as the director of the Moscow of-

fice of "People to People." The plaintiff contends that Mr. Scherbakov was not involved in the transaction on behalf of the plaintiff, as deputy director of Archexpo, but on behalf of the defendant who used the name "People to People." The plaintiff contends that Mr. Scherbakov had private business dealings with the defendant and that the plaintiff never received the $10,700 or the Toyota van. The plaintiff concedes, however, that the purchase of a van was discussed. The documents presented by the defendant do not indicate that tie request for payment was made by the plaintiff or that the payment was made for the benefit of the plaintiff as opposed to another person or that the payment was made to satisfy the defendant's contractual obligation. Under these circumstances, the arbiters disagree that $10,700 counts as payment under the contract.

4.3. As regards the cash payments of $71,500 allegedly made to Mr. Scherbakov and the four receipts signed by Mr. Scherbakov (July 14, 1989 for $11,700; August 10, 1989 for $29,800; August 11, 1989 for $10,000; and November 10, 1989 for $20,000), the arbiters find that the receipts are issued on the plaintiff's letterhead and that, as Mr. Scherbakov conceded, the signatures are his own.

Under Art. 228 of the RSFSR Civil Code, proper performance terminates the claim. A creditor who accepts performance must, at the debtor's request, issue a receipt for full or part performance. Under art. 228, the creditor's receipt is proof of the payment and fulfillment of monetary obligation by the debtor. The creditor, the plaintiff in the present case, can challenge the receipt by alleg-

ing that the underlying obligation did not in fact exist. The plaintiff has failed to offer convincing evidence which would disprove the evidentiary effect of the first three of the four offered receipts.

Mr. Scherbakov denies that he received cash from Mr. Swanson or Mr. Chatfield or gave them receipts but contends that he signed blank sheets which Mr. Swanson and Mr. Chatfield could use for other purposes. Without any evidence rebutting the evidentiary value of the receipts offered by the defendant, Mr. Scherbakov's forgery claim must be rejected. Similarly, the plaintiff's denial of receiving any payments from Mr. Scherbakov is not sufficient grounds for challenging the first three receipts. Because the plaintiff, a creditor, did not challenge the fact of payment by the defendant to the plaintiff's employee or the

employee's authority to receive such payment, the defendant, a debtor, is deemed to have fulfilled his financial obligation to the creditor regardless of how the payments were used.

As regards the fourth receipt dated November 10, 1989 for $20,000, the arbiters agree with the plaintiff that it cannot be counted as the defendant's payment under the contract. In a fax to the defendant on September 22, 1989, the plaintiff informed the defendant that all financial documents on behalf of the plaintiff shall be signed by the director of Archexpo, and that all receipts signed by other persons are void. In a fax sent to the defendant on September 27, 1989, the plaintiff asked the defendant for copies of receipts which had been signed by Mr. Scherbakov and which the defendant had referred to. It is obvious that under

these circumstances the defendant should not have made payments to or received receipts from any other person without the authorization of Archexpo's director. Performance contrary to the plaintiff's instructions which were legitimate under the contract cannot be considered proper performance which terminates the obligation. Thus, the debtor has the burden of proof that he paid the creditor. In the present case the creditor, Archexpo, denies that it has received the payment. The defendant has offered no proof other than the receipt from Mr. Scherbakov of making the payment. Moreover, the plaintiff stated and Mr. Scherbakov confirmed in a letter written on July 25, 1990, that in October 1989 Mr. Scherbakov was no longer working for Archexpo. Thus, the arbiters hold that the defendant cannot be deemed to have paid the plaintiff

$20,000 for which the receipt was issued on November 10, 1989. The arbiters further disagree with the defendant that the correspondence between the parties provides circumstantial evidence that the plaintiff conceded to having received the payment.

Thus, the arbiters find that of the $71,500 covered by the four receipts the defendant has paid the plaintiff $51,500. At the same time the arbiters stress that the parties are not precluded from pursuing other avenues of relief apart from arbitration. Specifically, these claims include: (1) Mr. Scherbakov's forgery claim; (2) the plaintiff's claim against Mr. Scherbakov for $51,000 which the plaintiff is deemed to have received due to the receipts signed by Mr. Scherbakov; and (3) the defendant's claim against Mr. Scherbakov and/or Mr. Swanson for

$20,000 which the defendant claims it paid but which the defendant denies it received.

4.4. The arbiters find no reason to mitigate the amount of damages owed to the plaintiff by $52,189.08 worth of office equipment. There are no grounds for the mitigation of damages either as a matter of the plaintiff's claim or as a matter of the defendant's counterclaim (incidentally, the defendant has not paid a filing fee for its counterclaim). The defendant alleges that the office equipment is owned by the defendant but is retained by the plaintiff in the plaintiff's office. The defendant contends that it purchased and shipped the said equipment to Moscow. Although the defendant agreed to leave the equipment for the plaintiff the defendant intended that the plaintiff would pay for it or accept it as part payment under the contract.

The arbiters find that the September 30, 1989 contract between the parties settles the issue of the equipment. The contract pertains to the "office equipment purchased or used by Archexpo and Citizen Ambassador Program." In particular, the contract provides that she equipment, owned by the U.S. party and installed in the office of the Soviet party "shall become property of Archexpo on November 15, 1989." The equipment included, among other things, a computer, a fax machine and telephones. The arbiters interpret this provision in the September 30, 1989 contract to relate to the parties' contractual obligations in Moscow. Under sec. 7 and sec. 8 of the April 28, 1989 contract, the plaintiff was to provide the defendant with an office and storage space and the defendant promised to compensate the plaintiff for its

expenses. The parties explained that the plaintiff's Moscow office was used for this purpose. Aside from the background facts behind the September 30, 1989 contract, it plainly states that the defendant agreed to turn the equipment over to the plaintiff. This promise is legally valid under Soviet law which controls the issues of property rights. The defendant raised no objection to the conclusion that the September 30, 1989 contract clearly covers all equipment which, according to the defendant, belonged to the defendant and was located in the plaintiff's office. The contract contains no provisions about payment for all or part of the said equipment.

Thus, the arbiters find that the defendant has turned the equipment over to the plaintiff; the arbiters find no proof of the plaintiff's obligation to pay for the equipment.

4.5. Finally, the defendant makes a counterclaim for $20,240 which the defendant had to refund some of its clients who were dissatisfied with the services provided by the plaintiff. Although the defendant stated its intention to file suit regarding this matter in the U.S. court because it believed that this claim is not covered by the arbitration agreement, in the defendant's reply dated November 19, 1990 the defendant asked for damages in the amount of $20,240. The arbiters believe that this request represents a counterclaim on the part of the defendant.

The arbiters find that the defendant has failed to meet procedural requirements for making a counterclaim under the Rules of the Arbitration Tribunal. Specifically, the defendant failed to pay the required filing fee. Sec. 29 and sec.

15.2(g), Rules of the Arbitration Tribunal; Sec. 2, sec. 4, Supplement to the Rules of the Arbitration Tribunal, Arbitration Fees. In spite of the defendant's failure to pay the filing fee the arbiters considered the defendant's request and found it without merit. The defendant offered letters from some of its clients who expressed their dissatisfaction with the services. Presumably, the clients negotiated the amount of services to be provided with the defendant, not the plaintiff. The defendant has failed to offer any evidence that inadequate services were caused by the failure on the part of the plaintiff. Similarly, the defendant has failed to offer evidence that it was obligated to refund the amount to the clients.

4.6. In light of the evidence presented in the case the arbiters find

that the defendant has Paid the plaintiff $170,040 ($110,540 + $8,000 + $51,500) for the services provided by the plaintiff. Having found that the defendant is liable to the plaintiff for $298,970 in damages, and having found that the defendant has paid the plaintiff $170,040 of the amount owed, the arbiters hold that the defendant must pay the plaintiff $128,930.

THE ORDER

Based on the reasons stated above, the arbiters order International Ambassador Program Inc., a U.S. corporation, Spokane, Washington, to pay Archexpo, a commercial center of the USSR Architects' Union, Moscow, USSR, $128,930 in satisfaction of the claim plus $2,800 in plaintiff's arbitration fees, or the total of $131,730 (US).

This order is final. Three original copies of this opinion were issued and signed. One is retained by the Arbitra-

tion Tribunal, and the other two are retained by the parties.

V.A. Kabatov

Chairman of the Arbitration Tribunal

S.N. Lebedev

Arbiter

K.L. Razumov

Arbiter

No. 95-1365

Supreme Court, U.S.
FILED
MAR 27 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

ARCHEXPO COMMERCE & INDUSTRY CENTRE, BORIS KHLEBIN and ANDREI SCHERBAKOV,

Petitioners,

vs.

INTERNATIONAL AMBASSADOR PROGRAMS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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16 pp

RULE 29.6 STATEMENT

International Ambassador Programs, Inc. ("Ambassador") was merged on August 4, 1995 into Ambassadors International, Inc. Ambassadors International Inc. is a public corporation, traded on NASDAQ under the symbol AMIE. Ambassadors International has no affiliates or subsidiaries other than Ambassador Programs Inc., the former International Ambassador Programs, Inc.

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I

COUNTER STATEMENT OF THE CASE

International Ambassador Programs Inc. ("Ambassador") was formed to organize informational programs and professional conferences in foreign countries. It was inspired by then-President Eisenhower's expressed hope that cultural exchanges between the West and Eastern Bloc countries might reduce Cold War frictions.

Archexpo Commerce & Industry Centre ("Archexpo") was a Soviet entity[1] which contracted to expedite visits by foreign delegations like those sent by Ambassador, by making travel reservations, getting accommodations, and assisting with visas and other arrangements.

Ambassador and Archexpo entered into contracts covering two distinct programs being operated by Ambassador. On April 28, 1989, they entered a contract at Moscow, USSR, in which "Citizen Ambassador" (a trade name for a division of Ambassador) promised to pay Archexpo to perform services for its delegations. This contract contained a clause requiring arbitration of disputes in the USSR. That agreement was modified on May 15, 1989, to call for Archexpo and "Citizen Ambassador" to finance one another's delegations (apparently in contemplation of Soviet delegations being received in this country by Ambassador), with offsetting expenses to be reconciled twice a year. This agreement also contained a clause calling for arbitration of disputes in the USSR. On August 22, 1989, "Citizen Ambassador" and Archexpo entered into a fresh contract, providing for advance payment by "Citizen Ambassador" prior to arrival of its delegations. Like the others, this contract too had a provision requiring arbitration in the Soviet Union.

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1. Archexpo's current status is unclear to Ambassador. Archexpo has claimed variously to be a "Russian limited partnership" and now a "commercial entity".

Meanwhile, in July 1989, Archexpo entered into a separate contract with Ambassador's "State Leadership Initiative" ("SLI") division, covering arrangements for visits by American delegations from state governments to the Soviet Union. This agreement, signed at Spokane, Washington, contained no arbitration provision.

Disputes developed in connection with both sets of agreements. The disputes over the Citizen Ambassador contracts were submitted to arbitration in the Soviet Union. Ambassador notified Archexpo and the arbitrators that it had claims, whose value exceeded the value of the claims asserted in arbitration, which were not arbitrable and which it intended to make the subject of a lawsuit in United States District Court at Spokane. Ambassador filed a lawsuit in District Court concerning the breach of the SLI contract (and the consequent injury to the SLI program), and served Petitioners Archexpo, Khlebin and Scherbakov. Petitioners did not appear, and did not answer.

The District Court action was resolved first. Ambassador moved for summary judgment against Archexpo, which was granted. Archexpo's only reaction to the motion for summary judgment was to send a letter (written by Petitioner Khlebin) to the district judge, which did not constitute a response or an appearance. The letter denied that the SLI contract was valid. It did not assert any right to arbitrate the SLI contract, or seek in any way to have the SLI contract submitted to arbitration. Nor did the letter suggest that the SLI contract had been addressed previously in arbitration — on the contrary, it affirmed that the contract "was never presented at the hearing in Moscow at the Arbitration court . . ."[2] The District Court entered judgment in favor of Ambassador against Archexpo on July 24, 1991.

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2. Petitioners contend that Ambassador "circumvented" or evaded arbitration, presumably to create the impression that some wrong was (Cont'd)

Later, the USSR tribunal made an award to Archexpo. Nearly two years after the District Court[3] entered judgment for Ambassador against Archexpo, Archexpo sought confirmation of the award in the United States District Court. Finding that none of the narrow grounds for repudiation of a foreign arbitration award under law existed, the District Court affirmed the award.

Significantly, there was no suggestion in connection with the proceedings to confirm the award that the award was in any sense inconsistent with the judgment Ambassador had previously been awarded in the District Court. Ambassador represented to the District Court that Ambassador's earlier judgment (based on the SLI contract) had "nothing to do with Citizen Ambassadors. It's a different program, different transaction altogether . . ." Archexpo did not dispute that representation; on the contrary, it expressly agreed through its counsel that the judgment awarded to Ambassador on the SLI contract was "*a separate issue*, but a related issue . . . As I said, *it's not relevant* to the issue of the motion [for confirmation of the arbitration award] here . . ."

The District Court entered judgment on the arbitration

(Cont'd)
practiced on Petitioners by Ambassador. That contention is incorrect. The SLI contract was not subject to arbitration; it contained no arbitration clause. Ambassador at all times fully disclosed to Petitioners and to the Soviet arbitration tribunal its intention to pursue its claim regarding the breach of the SLI contract in a court.

3. In the intervening two years, the Hon. Robert McNichols, who had entered the judgment in favor of Ambassador against Archexpo, passed away. The suit for confirmation of the arbitration award in favor of Archexpo, and the succeeding motion to vacate the original judgment in favor of Ambassador, were therefore referred to a different judge.

award on September 8, 1993. The District Court's decision was narrowly drawn, holding only that none of the limited grounds to refuse to confirm the award under the Convention governing recognition of foreign arbitration awards had been shown. Ambassador elected not to appeal this decision. The District Court had *not* yet held, as Petitioners imply in one place (*Petition p.* 11) and erroneously state in another, that the "arbitration award was based not on individual contracts but on the 'extended commercial relationship between the parties' " (*Petition p.* 14). On the contrary, counsel for the parties had agreed on the record that Archexpo's arbitration award on the Citizen Ambassador contracts was a "separate issue" from Ambassador's preexisting judgment on the SLI contract.

Once it had its arbitration award confirmed in the form of a judgment, Archexpo changed tack. It now argued that *both* judgments covered the *same* subject matter, that *all* agreements had been subject to arbitration, and that Ambassador had actually urged its SLI claim as a counterclaim in the Soviet arbitration. It urged the District Court to vacate the first judgment, that is, Ambassador's judgment against Archexpo. The District Court erroneously obliged.

The District Court reasoned that all contracts had been made in the course of dealings between Archexpo and Ambassador. Therefore, it thought, the arbitration clauses which had been included in the Citizen Ambassador contracts (which were negotiated and signed at Moscow, and which named "Citizen Ambassador" as the American party) should be deemed a part of the SLI contract (which was negotiated and signed at Spokane, Washington and which named "IAP Inc. State Leadership Initiative" as the American party). The SLI contract, of course, did not otherwise contain any arbitration clause.[4] The District

4. The absence of any arbitration clause was intentional. It is (Cont'd)

Court concluded that Archexpo's claim against Ambassador, and Ambassador's claim under the SLI contract against Archexpo therefore constituted a "single cause of action" which should have been decided in the same litigation, and that Archexpo's judgment confirming its arbitration award, being the "last in time" of two "inconsistent" judgments, should control.[5] The District Court therefore vacated the judgment in favor of Ambassador.

Ambassador appealed the order vacating its judgment. It pointed out that as a matter of undisputed fact the Citizen Ambassador and SLI contracts were separate contracts, and that as a matter of contract law there was no basis to import the arbitration clause from the former into the latter. Ambassador showed that the District Court had erred in its application of the *res judicata* rules by confusing the rules which forbid a plaintiff to split a "single cause of action" into several lawsuits with the very different rules governing the handling of the opposing claims of plaintiffs and defendants. Ambassador demonstrated that its SLI claim was not subject to any arbitration clause, and was not required to be (and had not been) posed as a counterclaim in the Soviet arbitration proceeding. Ambassador pointed out that the two judgments were neither "inconsistent" nor

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(Cont'd)
Ambassador's policy not to agree to any arbitration clauses calling for international arbitration in any place other than Sweden. Ambassador argued that the inclusion of the arbitration clause in the Citizen Ambassador contracts in derogation of its policy was *ultra vires*. The Soviet arbitrators rejected that argument, and the District Court affirmed their award. But the Court of Appeals was correct in refusing Archexpo's invitation to treat the SLI contract as though it contained a provision which the parties had deliberately omitted.

5. Petitioners characterize this reasoning as "prosaic", *Petition p.* 12, from which we understand that Petitioners now agree the District Court's reasoning was wrong.

antagonistic for *res judicata* purposes, as they covered different disputes. Ambassador asked the Court of Appeals to direct the District Court to honor *both* judgments, and to direct that the judgment in favor of Ambassador be reinstated.

The Court of Appeals agreed, and reversed. It held, on the undisputed facts of record, that the SLI contract was not subject to any arbitration clause, that the claim had not actually been litigated in the arbitration proceeding, and that both judgments were valid. The Court of Appeals ordered the District Court to reinstate Ambassador's judgment against Archexpo.[6]

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6. The District Court has received the mandate from the Court of Appeals, and has followed it. Following remand, Petitioners advised the District Court that judgment had only been entered against Archexpo originally, and urged that judgment not be entered against Petitioners Khlebin and Scherbakov. Ambassador, having verified that through some apparent oversight Messrs. Khlebin and Scherbakov were not named in the original judgment, took no position, but suggested default judgments could be entered against Messrs. Khlebin and Scherbakov, who had never appeared in the action, now over five years old. The District Court entered judgment for Ambassador against Archexpo only. Messrs. Khlebin and Scherbakov entered their appearance in an attempt to avoid default. The District Court has not yet heard or decided a motion for default judgment against them. Their assertion of standing as Petitioners here as persons subject to an adverse judgment is inconsistent with the representations they have made in the District Court.

REASONS FOR DENYING THE WRIT

THE PETITION POSES PRIMARILY FACTUAL ISSUES, AND NO LEGAL ISSUES OF CONSEQUENCE, AND SHOULD THEREFORE BE DENIED.

A. The Petition for Writ of Certiorari Raises No Significant Legal Issues for This Court to Decide

1. *The Court of Appeals' Decision Turned Primarily on Questions of Fact Which Were Resolved Against Archexpo.*

Archexpo was entitled to have Ambassador's judgment against it vacated only if it could show that Ambassador had a duty to arbitrate its claims arising out of the SLI contract in the USSR instead of bringing suit in District Court, or if it could show that Ambassador actually had litigated the SLI claims in arbitration and was therefore barred by the doctrine of *res judicata* from litigating it in District Court.

Whether Ambassador had a duty to arbitrate depended upon two questions: (1) whether the SLI contract was a discrete contract (which, having no arbitration provision, could be sued upon) or whether it was instead (along with the several Citizen Ambassador agreements) a part of a unitary contractual scheme all of which was subject to the arbitration provisions in the Citizen Ambassador contracts; and (2) whether or not some compulsory counterclaim rule in the Soviet arbitration proceeding required Ambassador to bring its claim in arbitration. Whether the two judgments were inconsistent for purposes of *res judicata* depended on the latter questions relating to the arbitrability of the SLI claim, and also upon whether Ambassador had in fact actually litigated its SLI claim before the Soviet arbitration tribunal. Of these questions, only the question

concerning the meaning of Soviet arbitration law is a question of law.[7]

Archexpo claimed that the SLI contract was not a discrete contract, but was part of a single contractual "course of dealing" also involving the Citizen Ambassador contracts, and therefore subject to the arbitration clauses in the Citizen Ambassador contracts.[8] It claimed that the Soviet arbitration rules contained a compulsory counterclaim rule. Finally, Archexpo claimed that Ambassador had actually litigated the SLI claim in arbitration.[9]

Archexpo lost below because the Court of Appeals rejected Archexpo's arguments as to all three propositions. The Court of Appeals agreed with Ambassador on the undisputed facts that the SLI contract (which contained no arbitration clause) was distinct from the Citizen Ambassador contracts (which did contain arbitration clauses), *Petition, Appendix pp.* A-18-20; that Archexpo had not demonstrated the existence of any compulsory counterclaim rule, *Petition, Appendix pp.* A-25-26; and that Ambassador had not actually litigated its SLI claim in arbitration. *Petition, Appendix pp.* A-24-25.

The Questions posed by the petition for a writ of certiorari and the arguments offered in support of the writ are fact-bound.

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7. F.R.C.P. 44.1 provides that issues of foreign law, which were formerly considered questions of fact, are to be decided as a matter of law.

8. Archexpo never explained why, if that really was its view of the contracts, it had not so informed the District Court in 1991. The contention is meritless, but even were it not meritless Archexpo waived it by its failure to timely raise it.

9. Archexpo has now apparently abandoned the assertion that the SLI claim was actually litigated in arbitration in Moscow. *Petition pp.* 7-8.

Petitioners argue that the Court of Appeals erroneously decided a congeries of factual issues, but point to only one alleged mistake on a question of law, relating to the proper construction of a procedural rule in Soviet Arbitration.

Question 1 in the Petition depends upon the assertions that (1) Respondent "circumvented" arbitration, and (2) that Petitioner Archexpo's arbitration award was "nullified". Question 2 supposes (1) that Soviet procedural law in connection with arbitrations imposed a compulsory counterclaim rule, and (2) that the Court of Appeals "ignored" Soviet procedural rules.

The Court of Appeals also heard and rejected the claim that Respondent improperly "circumvented" arbitration. Though the Court of Appeals did not discuss the claim in its opinion, the claim was a principal argument in Petitioners' brief in the Court of Appeals, and was answered in Respondent's reply in the Court of Appeals. The Court of Appeals' rejection of the claim is implicit in its decision that Ambassador never had any duty to arbitrate the SLI claim..

The Court of Appeals explicitly rejected the claim that Petitioner's award in arbitration would be "nullified" by the reinstatement of Ambassador's judgment against Archexpo. *Petition, Appendix p.* A-27. That claim is simply incorrect. The only judgment which was ever "nullified" at any point in these proceedings was that judgment won by Ambassador, which the District Court had vacated, but which has now been reinstated.

The Court of Appeals did not ignore the Russian authorities cited by Archexpo. It simply held that these authorities did not establish the existence of a compulsory counterclaim rule.

2. This Court's Resources Should Not Be Spent on Reexamination of Disputed Issues of Fact

This Court has said that it does not exercise its discretionary jurisdiction to decide disputed issues of fact. *National Labor Relations Board v. Hendricks County Rural Electric Membership Corp.*, 454 U.S. 170, 176-77 n. 8, (1981) *citing Rudolph v. United States*, 370 U.S. 269 (1962); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938). The Court of Appeals based its decision on determinations of fact with which the Petitioners do not agree. Petitioners do not say that if the Court of Appeals was correct in its understanding of the facts, they nonetheless would have prevailed below but for some error of law. Petitioners do accuse the Court of Appeals of indulging some generalized "antipathy" to arbitration, but they do not demonstrate that they were entitled to prevail given the facts as the Court of Appeals understood them. Petitioners do not show, for example, assuming the Court of Appeals correctly held that the SLI contract was a separate agreement which contained no arbitration clause, that any principle requires a party to arbitrate a contractual dispute it has not agreed to arbitrate. This Court long ago declared that arbitration is required only when it has been agreed to. *United Steel Workers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

B. The Only Issue of Law Posed by the Petition Is an Issue of Foreign Law, Which This Court Need Not Entertain, for Several Reasons.

The Petition presents only one issue that involves a question of law, the issue posed by Archexpo's claim that Soviet law of arbitration contains a provision for compulsory counterclaims. That is not an issue which merits attention by this Court, for four reasons.

First, there is no reason that this Court should devote its time to making pronouncements about the meaning of foreign law. It is not likely that legal practitioners or business people will look to this Court for controlling authority on foreign law, in preference to the authorities from the country where the law is in effect.

Second, the Court of Appeals was right: the provision of law Petitioners rely upon is not a compulsory counterclaim rule. Petitioners rely upon a provision which on its face does no more than declare a straightforward policy of *res judicata,* that a tribunal will not litigate a matter which has already been litigated in some other tribunal. *Petition pp.* 4, 20. Though Petitioners have obviously convinced themselves, through somewhat strained reasoning, *Petition pp.* 20-21, that the rule on which they rely requires counterclaims to be asserted in arbitration, the language of the rule actually says no such thing. The Court of Appeals was correct in its refusal to read the rule as a compulsory counterclaim rule.

Third, consideration of the rule cited by Petitioners is not even relevant if, as the Court of Appeals held, Ambassador's SLI claim was not required to be submitted in arbitration in the first place because the agreement from which the claim arose did not provide for arbitration. That a party is required to submit a specified matter to arbitration under one contract does not mean that it is required to submit its other, *non*-arbitrable claims arising from another contract in arbitration. This Court has never held that arbitration can be compelled in relation to any contract in which it has not been agreed to.

Fourth, it is not certain that, following the collapse of the Soviet Union, the rule is even still extant. Even if this Court were disposed to declare foreign law, it should not do so where it is not clear the law it is being asked to declare is of any interest to anyone but historians.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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